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# FAST TRACK

**Briefing on How To Use the Federal Register**  
For information on the briefing in St. Louis, MO, see  
announcement on the inside cover of this issue.





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## THE FEDERAL REGISTER WHAT IT IS AND HOW TO USE IT

- FOR:** Any person who uses the Federal Register and Code of Federal Regulations.
- WHO:** The Office of the Federal Register.
- WHAT:** Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

### ST. LOUIS, MO

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# Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 531, 536, and 550

#### Portability of Benefits for Nonappropriated Fund Employees

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing interim rules governing pay-setting and crediting of former nonappropriated fund (NAF) service for within-grade increases, grade and pay retention, and severance pay for certain former NAF employees under the Portability of Benefits for Nonappropriated Fund Employees Act of 1990.

**DATES:** Interim rules effective retroactively to January 1, 1987. Comments must be received on or before June 9, 1992.

**ADDRESSES:** Send or deliver written comments to Barbara L. Fiss, Assistant Director for Compensation Policy, U.S. Office of Personnel Management, room 6H31, 1900 E Street, NW., Washington, DC 20415.

**FOR FURTHER INFORMATION CONTACT:** Bernadette Christie, (202) 606-2858 or (FTS) 266-2858.

**SUPPLEMENTARY INFORMATION:** The Portability of Benefits for Nonappropriated Fund Employees Act of 1990 was enacted as section 7202 of the Omnibus Budget Reconciliation Act of 1990, Public Law 100-508, November 5, 1990. It applies to employees of nonappropriated fund (NAF) instrumentalities of the Department of Defense (DoD) or Coast Guard who move or have moved, either voluntarily or involuntarily, on or after January 1, 1987, without a break in service of more than 3 days, to positions in DoD or the

Coast Guard, respectively. The law preserves the rate of basic pay earned as an NAF employee immediately prior to an involuntary move to a General Schedule position and allows the agency to consider the rate of basic pay as an NAF employee when setting pay after a voluntary move. The Act further credits former NAF service for within-grade increase and leave accrual purposes, and authorizes OPM to determine the appropriate circumstances in which former NAF employees may be granted grade and pay retention.

If an NAF employee has previous service in the Federal civil service employment system and would benefit from the highest previous rate provisions of 5 CFR 531.203(c), those provisions may be used to set his or her pay under General Schedule. The interim rule enables DoD or the Coast Guard to consider the highest previous rate an employee earned under an NAF instrumentality as his/her highest previous rate for pay-setting purposes under the General Schedule when the employee moves voluntarily without a break in service of more than 3 days to a position in the same agency. When such an employee moves involuntarily—that is, the employee's position is moved from an NAF instrumentality in DoD or the Coast Guard to the civil service employment system of the same agency—the employee's pay under the General Schedule may be set no lower than the lowest step of the grade to which the employee is moving that is equal to or greater than his or her rate of basic pay under the NAF instrumentality immediately before the move.

When the rate of basic pay of a former NAF employee immediately before an involuntary move exceeds the maximum rate of the grade to which the employee is moving, the interim rule also allows the agency to provide pay retention to the employee. Since such a move does not result from reduction in force or reclassification procedures, grade retention does not apply, but should an employee later be reduced in grade after moving to the civil service employment system, the employee's former NAF service may be applied to the 52 weeks of consecutive service required to be eligible for grade retention.

The interim rule credits the service of a former NAF employee, who moves

under the provisions of the Act, in the computation of the waiting period for one within-grade increase. When crediting the service of a former NAF employee, the waiting period for the next within-grade increase begins at the time the employee is deemed to have received his or her last equivalent increase, as provided in 5 CFR 531.407.

Finally, for severance pay purposes, NAF service will be credited toward meeting the requirement for 12 months of continuous employment under 5 CFR 550.705 and will be creditable service under 5 CFR 550.708.

Agencies must adjust the pay records of individuals who are entitled to benefit from the retroactive provisions of the Act affecting pay-setting, service credit for within-grade increases, and severance pay.

#### Waiver of Notice of Proposed Rulemaking and Delay in Effective Date

The Portability of Benefits for Nonappropriated Fund Employees Act of 1990 is retroactive to January 1, 1987. In order to give practical effect to this legislation, I find good cause exists to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(3)(B). Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective retroactively to January 1, 1987. The delay in the effective date is being waived to give affected employees the benefit of these new provisions as of the date required by the statute.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they apply only to Federal agencies and employees.

#### List of Subjects in 5 CFR Parts 531, 536, and 550

Administrative practice and procedure, Government employees, Wages.



U.S. Office of Personnel Management.  
**Constance Berry Newman,**  
*Director.*

Accordingly, OPM is amending parts 531, 536, and 550 of title 5 of the Code of Federal Regulations as follows:

**PART 531—PAY UNDER THE GENERAL SCHEDULE**

1. The authority citation for part 531 is revised to read as follows:

**Authority:** 5 U.S.C. 5115, 5338, and chapter 54; E.O. 12748; subpart A issued under section 302 of the Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509), 104 Stat. 1462, and E.O. 12736; subpart B also issued under 5 U.S.C. 5303(g), 5333, 5402, and 7701(b)(2) and section 7202(d) of the Omnibus Budget Reconciliation Act of 1990, (Pub. L. 101-508), 104 Stat. 1388-335; subpart C also issued under section 404 of Pub. L. 101-509; 104 Stat. 1466, and E.O. 12748; subpart D also issued under 5 U.S.C. 7701(b)(2) and section 7202(e) of the Omnibus Budget Reconciliation Act of 1990, (Pub. L. 101-508)d, 104 Stat. 1388-336; subpart E also issued under 5 U.S.C. 5336.

2. In § 531.202, paragraphs (g) through (l) are redesignated as (h) through (m), respectively, and a new paragraph (g) is added to read as follows:

**§ 531.202 Definitions.**

(g) *Moved involuntarily* means the movement of the incumbent of a position in a nonappropriated fund instrumentality under the jurisdiction of the Department of Defense or the Coast Guard, as described in 5 U.S.C. 2105(c), with the position when it is moved to the civil service employment system of the Department of Defense or the Coast Guard, respectively.

3. A new section 531.206 is added to read as follows:

**§ 531.206 Setting pay upon movement from nonappropriated fund instrumentalities.**

(a) Unless the employee is eligible to receive a higher rate of basic pay under § 531.203(c) of this part, the initial rate of basic pay under the General Schedule of an employee of the Department of Defense or the Coast Guard who moves voluntarily, without a break in service of more than 3 days, from a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, respectively, may be set at any rate within the grade of the General Schedule position that does not exceed the highest previous rate of basic pay received by the employee during his or her service in a position in a nonappropriated fund instrumentality, as described in 5 U.S.C. 2105(c).

(b) Unless the employee is eligible to receive a higher rate of basic pay under

paragraph (c) of this section, the initial rate of basic pay under the General Schedule of an employee of the Department of Defense or the Coast Guard who is moved involuntarily, without a break in service of more than 3 days, from a position with substantially the same duties in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, respectively, shall be set at the rate for the lowest step of the General Schedule grade in which pay is being set, for which the rate of basic pay is equal to or greater than the employee's rate of basic pay under the nonappropriated fund instrumentality immediately before the move.

(c) Unless an employee is entitled to receive a higher rate of basic pay under paragraph (b) of this section, the initial rate of basic pay of an employee who is moved involuntarily, without a break in service of more than 3 days, from a position under a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, may be set—

(1) At any rate within the grade of the General Schedule position that does not exceed the highest previous rate of basic pay received by the employee during his or her service in a nonappropriated fund instrumentality, as described in 5 U.S.C. 2105(c);

(2) Under the maximum payable rate rules in § 531.203(c) of this part; or

(3) Under the authority to grant pay retention in § 536.104(c) of this part.

4. In § 531.406, a new paragraph (b)(3) is added to read as follows:

**§ 531.406 Creditable Service.**

(b) \* \* \*

(3) Service by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who moves, within the civil service employment system of the Department of Defense or the Coast Guard, respectively, and without a break in service of more than 3 days, to a position classified and paid under the General Schedule, is creditable service in the computation of a waiting period.

**PART 536—GRADE AND PAY RETENTION**

5. The authority citation for part 536 is revised to read as follows:

**Authority:** 5 U.S.C. 5361-5366 and section 7202(f) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101-508), 104 Stat. 1338-

336; § 536.307 also issued under 5 U.S.C. 552, Freedom of Information Act, Pub. L. 92-502.

6. In § 536.103, paragraphs (c) (1) and (3) are revised to read as follows:

**§ 536.103 Coverage and applicability of grade retention.**

(c)(1) An employee who, immediately before being placed in a lower graded position as a result of reduction-in-force procedures, is in a position under a covered pay schedule, is eligible for grade retention only if the employee has served for 52 consecutive weeks or more in a position(s) under a covered pay schedule at a grade(s) higher than the position in which the employee is placed, including service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

(2) \* \* \*

(3) In situations other than those covered in paragraphs (c)(1) and (c)(2) of this section, an employee is eligible for grade retention if he or she, immediately prior to being placed in the lower grade, has served in a position in any pay schedule for 52 consecutive weeks or more, provided the service was in an agency as defined in 5 U.S.C. 5102 at a grade(s) higher than the position in which the employee is placed, including service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who is moved to a position in the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days.

7. In § 536.104, a new paragraph (c) is added to read as follows:

**§ 536.104 Coverage and applicability of pay retention.**

(c) The head of the agency may grant pay retention to an employee whose pay is reduced as the result of the movement of his or her position from a nonappropriated fund instrumentality under the jurisdiction of the Department of Defense or the Coast Guard to the civil service employment system of the Department of Defense or the Coast Guard, respectively.



**PART 550—PAY ADMINISTRATION  
(GENERAL)****Subpart G—Severance Pay**

8. The authority citation for subpart G continues to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257.

9. In § 550.705, at the end of paragraph (a)(1), "or" is removed; at the end of paragraph (a)(2), "." is replaced with "; or"; and a new paragraph (a)(3) is added to read as follows:

§ 550.705 **Criteria for meeting the requirement for 12 months of continuous employment.**

(a) \* \* \*

(3) An appointment to a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard that precedes the current qualifying appointment in the Department of Defense or the Coast Guard, respectively.

\* \* \* \* \*

10. In § 550.708, at the end of paragraph (b), "and" is removed; at the end of paragraph (c), "." is replaced with "; and"; and a new paragraph (d) is added to read as follows:

§ 550.708 **Creditable service.**

\* \* \* \* \*

(d) Service performed by an employee of a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard, as defined in 5 U.S.C. 2105(c), who moves, within the civil service employment system of the Department of Defense or the Coast Guard, respectively, without a break in service of more than 3 days, to a position classified and paid under the General Schedule.

[FR Doc. 92-8274 Filed 4-9-92; 8:45 am]

BILLING CODE 6325-01-M

**5 CFR Part 553**

RIN 3206-AE33

**Reemployment of Military and Civilian Retirees To Meet Exceptional Employment Needs**

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to implement provisions of the Federal Employees Pay Comparability Act of 1990 (FEPCA). The Act permits OPM to authorize retired military and Federal civilian personnel to be employed without loss of pay or annuity when such employment is

needed to meet exceptional difficulty in recruiting or retaining qualified candidates for particular positions or under other unusual circumstances.

**EFFECTIVE DATE:** May 11, 1992.

**FOR FURTHER INFORMATION CONTACT:** Tracy E. Spencer (202) 606-0960 or FTS 266-0960.

**SUPPLEMENTARY INFORMATION:**

Generally, 5 U.S.C. 5532 requires a reduction in the retired or retiree pay of any regular officer who is employed in a civilian position. The law also requires a reduction in the retired or retiree pay of a retired reserve or enlisted member if combined compensation from civilian salary and retired or retiree pay exceeds the rate of basic pay for Executive Level V. No reduction is required if the member's retired or retiree pay is based in whole or in part on a combat disability as defined in the law. Under 5 U.S.C. 8344 and 8468, the amount of an annuity under the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) is generally deducted from the basic pay of an annuitant who is reemployed in a Federal civilian position. Under certain circumstances, however, annuity payments stop upon reemployment, such as in the case of an annuitant who receives a Presidential appointment.

Section 108 of FEPCA amended 5 U.S.C. 5532, 8344, and 8468 to permit OPM to authorize exceptions to the reduction in pay or annuity normally required for either military or civilian retirees in two situations:

(1) For temporary employment that "is necessary due to an emergency involving a direct threat to life or property or other unusual circumstances" (which may be delegated to agencies); and

(2) "(o)n a case-by-case basis for employees in positions for which there is exceptional difficulty in recruiting or retaining a qualified employee."

Interim regulations implementing these provisions were published on February 14, 1991 (56 FR 6204). Those regulations required that most requests for reemployment without penalty be approved by OPM on a case-by-case basis, but provided that OPM will entertain individual agency requests for delegation to meet specific situations. The regulations also required that all requests be submitted by the agency head or a designee at the agency or departmental headquarters level and set out basic criteria for submission of requests.

Five Federal agencies and four individuals commented on the interim regulations. Two commenters suggested

either repeal of the restrictions or general delegation to agencies of authority to waive the restrictions in any circumstances. These suggestions cannot be adopted because both the restrictions and the conditions under which they may be waived are prescribed by law.

Six commenters suggested broader delegation to agencies to approve waivers in emergencies or to approve waivers for a class of positions or situations. We did not adopt these suggestions because we believe that broad delegation of this authority at this time would exceed the intent of FEPCA. In enacting FEPCA, Congress left intact the basic statutory restrictions on simultaneous receipt of regular and retirement pay from the Federal Government. Although the new law permits some waivers of these restrictions, the language of the law ("unusual circumstances," "exceptional difficulty") indicates that these waivers are to be the exception, not the rule. OPM may reevaluate the policy set out in these final regulations after we gain substantive experience in applying the flexibility granted by FEPCA. Initially, however, we believe a literal reading of the law is appropriate to ensure that actions taken under FEPCA do not exceed statutory intent.

Some of the formal comments, as well as telephone inquiries about the interim regulations, showed a need to clarify coverage of the regulations. The final regulations state that exceptions may be requested from: (1) The reemployed annuitant provisions of 5 U.S.C. 8344 (for CSRS) or 8468 (for FERS), as appropriate; (2) either or both of the reductions in retired pay required by 5 U.S.C. 5532; or (3) any combination of (1) and (2) above. The final regulations also state that an individual who is receiving both military retired or retiree pay and a CSRS or FERS annuity is to be treated as a reemployed civilian annuitant. Such an individual is ineligible for retirement coverage during reemployment if the provisions of 5 U.S.C. 8344 or 8468 are waived.

The CSRS retirement provisions governing reemployed annuitants include provisions requiring termination of annuities based on discontinued service upon reemployment. Since the intent of those provisions is to move individuals from the annuity rolls back into regular employment, OPM will generally approve exceptions to them only for temporary or emergency employment, unless the agency can show that an exception in a particular case would be within the intent of the statute.



With these changes, we are adopting the interim regulations as final.

#### E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined in E.O. 12291, Federal Regulation.

#### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only Federal employees and agencies.

#### List of Subjects in 5 CFR Part 553

Government employees, Wages, Retirement, Administrative practice and procedure.

Office of Personnel Management.

Constance Berry Newman,  
Director.

Accordingly, OPM's interim regulations amending 5 CFR parts 550 and 553 published February 14, 1991, at 56 FR 6205, are adopted as final with the following changes:

#### PART 553—REEMPLOYMENT OF MILITARY AND CIVILIAN RETIREES TO MEET EXCEPTIONAL EMPLOYMENT NEEDS

1. The authority citation for part 553 continues to read as follows:

Authority: 5 U.S.C. 5532, 8344, and 8468.

2. Section 553.101 is revised to read as follows:

##### § 553.101 Applicability.

This part applies to employment of both civilian annuitants who would be subject to termination of annuity or annuity offset under 5 U.S.C. 8344 or 5 U.S.C. 8468 and former members of the uniformed services who would be subject to reduction in retired or retainer pay under 5 U.S.C. 5532. Agencies may request exceptions as provided in subpart B from the reemployed annuitant provisions of 5 U.S.C. 8344 (for Civil Service Retirement System annuitants) or 8468 (for Federal Employees Retirement System annuitants), as appropriate, and/or from either or both of the reductions in retired pay required by 5 U.S.C. 5532.

3. In § 553.201, the section heading is revised, a new paragraph (b)(4) is added and paragraph (e)(3) is revised to read as follows:

##### § 553.201 Requesting OPM approval for reemployment without reduction in individual cases.

(b) \* \* \*

(4) Unless the request is submitted in accordance with paragraph (c) of this

section, or involves employment that is excluded from retirement coverage, a request for continuation of an annuity that would otherwise be terminated under 5 U.S.C. 8344 or 8468 must show that continuation of the annuity would be within the spirit of the applicable law.

(e) \* \* \*

(3) *Need for retention.* The agency must show good cause to believe that the employee will retire (or, in the case of an individual currently reemployed without an exception, will resign from that position) and that the agency will lose his or her services if the exception is not granted.

4. In § 553.202, the section heading is revised to read as follows:

##### § 553.202 Request for delegation of authority to approve reemployment without reduction in emergencies.

5. In § 553.203, the section heading and paragraph (b) are revised to read as follows:

##### § 553.203 Status of individuals serving without reduction.

(b) *Retired members of the uniformed services.* Except for individuals to whom paragraph (a) of this section is applicable, retired member employed without reduction in retired or retainer pay under this part are considered employees for the purposes of subchapter III of chapter 83 or chapter 84 of title 5, United States Code, subject to the same conditions as apply to any other employees.

[FR Doc. 92-8275 Filed 4-9-92; 8:45 am]

BILLING CODE 6325-01-M

#### DEPARTMENT OF AGRICULTURE

#### Commodity Credit Corporation

#### 7 CFR Parts 1413 and 1421

#### Common Provisions for the Wheat, Feed Grains, Cotton, and Rice Programs

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: On August 19, 1991, the Commodity Credit Corporation (CCC) issued a proposed rule with respect to discretionary provisions for the price support and production adjustment programs for wheat, feed grains, upland and extra long staple (ELS) cotton, and

rice which are conducted by the CCC in accordance with the Agricultural Act of 1949 (the 1949 Act), as amended. This final rule amends the regulations at 7 CFR part 1413 to implement the changes on the following program determinations: (a) The percentage of advance deficiency payments; (b) the types of crops which may not be planted on "flexible acreage"; (c) targeted option payments (TOP); (d) allowing the planting of designated crops on up to one-half of the reduced acreage; (e) allowing the planting of oats on wheat and feed grains acreage conservation reserve (ACR); (f) planting of conserving crops on ACR; and (g) whether producers of malting barley should be exempt from complying with the acreage reduction requirements and maintain eligibility for feed grain loans, purchase and payments. In addition, this final rule amends 7 CFR part 1421, with respect to the 1992 price support rates for wheat, feed grains, rice, oilseeds, and peanuts.

EFFECTIVE DATE: April 10, 1992.

#### FOR FURTHER INFORMATION CONTACT:

Kathryn A. Broussard, Agricultural Economist, Commodity Analysis Division, U.S. Department of Agriculture (USDA), Agricultural Stabilization and Conservation Service, room 3744-S, P.O. Box 2415, Washington, DC 20013 or call (202) 720-7923.

SUPPLEMENTARY INFORMATION: The final Regulatory Impact Analysis describing the options considered in developing this final rule and the impact of the implementation of each option is available on request from the above-named individual.

This final rule has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Departmental Regulation No. 1512-1 and has been designated as "major". It has been determined that these program provisions will result in an annual effect on the economy of \$100 million or more.

The title and numbers of the Federal assistance program, as founded in the catalog of Federal Domestic Assistance, to which this final rule applies are as follows:

Titles	Numbers
Commodity Loans and Purchases.....	10.051
Cotton Production Stabilization.....	10.052
Feed Grains Production Stabilization.....	10.055
Wheat Production Stabilization.....	10.058
Rice Production Stabilization.....	10.065

It has been determined that the Regulatory Flexibility Act is not applicable to this notice since CCC is not required by 5 U.S.C. 553 or any other



provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of human environment. Therefore, neither an environmental assessment nor an Environmental Impact Statement is needed.

This program/activity is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

The amendments to 7 CFR 1413 and 1421 set forth in this proposed rule do not contain information collections that require clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35).

#### 7 CFR Part 1413

This final rule amends 7 CFR part 1413 to set forth the determination of certain discretionary provisions of the 1949 Act that would be implemented and the manner in which implementation would be made.

In response to the proposed rule published on August 19, 1991, 51 timely letters were received. Comments in nine of the letters received did not pertain to the common provisions request for comments. The remaining forty-two letters contained 51 relevant comments for the common provisions outlined in the proposed rule. Respondents included the following: 23 producers, 9 national producer organizations, 9 State producer organizations, and 3 agribusinesses, a member of congress, a lawyer, a State Agriculture Department, a State Extension Service, an ASC County Committee, and a SCS Conservation District.

#### Advance Deficiency Payment Rate

A total of 17 respondents commented on the percentage of the projected deficiency payments to be made in advance for the 1992-95 crops. Eight respondents were national producer organizations, 7 were State producers organizations, and 2 were producers. Of the comments received on advance deficiency payments, 9 respondents favored a 40-percent advance and 8 favored a 50-percent advance.

If an acreage limitation program is in effect, 40-percent advance deficiency payments will be made available to eligible producers of the 1992-95 crops of wheat, feed grains, upland cotton, and rice because 40-percent advance payments provides producers with

adequate operating capital and less risk of potential refunds.

#### Crops Prohibited on Flexible Acreage

Comments were received from 26 respondents concerning crops prohibited from being planted on flexible acreage. Respondents included: 5 National producer organizations, 5 State producer organizations, 15 producers, and 1 agribusiness. Nine respondents recommended no changes to the list of prohibited crops. Twelve comments received requested that wild rice be permitted on flexible acreage. Three comments requested that dry edible beans be permitted on flexible acreages; one comment requested that millet be prohibited, and another requested that no restrictions be implemented on flexible acres.

For the 1992 and subsequent years, producers will have the option to designate sugarcane as considered planted to sugarcane or as planted on flexible acres and therefore, considered planted to the program crop instead of sugarcane.

Since dry edible beans are vegetables, there is no statutory authority to allow the planting of such crops on flexible acres. Therefore, dry edible beans will not be allowed on flexible acres.

Comments received from California producers indicated that additional production of wild rice would not affect the wild rice market and requested that wild rice be allowed on flexible acres. As in 1991, the decision was made not to allow the production of wild rice on flexible acres due to the volatility of the specialty market that currently exists for wild rice.

#### Implementation of TOP

Fourteen responses were received on the TOP provision. Five State producer organizations, three National producer organizations, one senator, and one State agriculture commissioner requested that the TOP be implemented. Three National producer organizations and one State producer organization requested that TOP not be implemented.

TOP will not be implemented because it is determined that producers already have substantial planting flexibility and because it would not currently be feasible to operate the TOP as mandated by The 1949 Act which requires that in implementing TOP no additional budget outlays may occur.

#### Designated Crops on ACR

Nine comments were received from 5 National producer organizations, 2 State producer organizations, and 2 producers requesting that the harvesting of designated crops not be allowed on up

to one half of the announced acreage reduction. No comments were received favoring the harvesting of designated crops on ACR.

The harvesting of designated crops on ACR will not be allowed because it is determined that producers already have the flexibility to plant designated crops on flexible acres.

#### Oats on Wheat and Feed Grains ACR

A total of 8 comments were received concerning the planting of oats for harvest on wheat and feed grains ACR. Responses from 3 National producer organizations and 2 State producer organizations were opposed to the harvest of oats on ACR. Two responses from the food industry and one from a national producer organization were in favor of planting oats for harvest on ACR.

The planting of oats for harvest on wheat and feed grains ACR will not be permitted because it is determined that producers already have the ability to expand oats production under the planting flexibility provision.

#### Conserving Crops for Harvest on ACR

Thirteen comments were received concerning conserving crops on ACR. Eight were against the harvesting of conserving crops on ACR. These responses included 3 National producer organizations, 2 State producer organizations, 2 producers, and 1 university extension service. Five comments—2 National producer organizations, 2 State producer organizations, and one county ASC office—were in favor of the harvesting of conserving crops on ACR.

Since producers can plant all of the conserving crops, except castor beans, under the flexibility provision and a sufficient supply of conserving crops is available, harvesting of conserving crops on ACR is not allowed.

#### Malting Barley Exemption

Seven responses were received requesting that malting barley not be exempt from acreage reduction requirements. The respondents included 3 National producer organizations and 4 State producer organizations. No comments were received in favor of the malting barley exemption.

Malting barley will not be excluded from the acreage reduction requirements because malting barley supplies are expected to be adequate and to avoid complicating the program since producers often plant varieties that can be used for either malting or feed purposes.



Accordingly, the following program determinations are made with respect to the provisions that are applicable to the crops of wheat, feed grains, upland and ELS cotton, and rice:

**A. The Percentage of Estimated Deficiency Payments Which Will be Made Available to Producers of the 1992-95 Crops of Wheat, Feed Grains, Upland and ELS Cotton, and Rice**

Section 114(a)(2)(F) of the 1949 Act requires that advance deficiency payments be made available to producers of wheat, feed grains, upland cotton, and rice whenever an acreage limitation program is established. For wheat and feed grains, not less than 40 percent, nor more than 50 percent, of the projected payment rate shall be made in advance; for upland cotton and rice, not less than 30 percent nor more than 50 percent of the projected payment rate shall be made in advance. Section 103(h)(3)(C) of the 1949 Act permits the Secretary to authorize advance deficiency payments to producers of ELS cotton, not to exceed 50 percent of the projected payment rate.

If an acreage limitation program is in effect, advance deficiency payments for the 1992-95 crops of wheat, feed grains, upland cotton, and rice will be 40 percent of the projected payment rate. For the 1992 crop of ELS cotton, no advance deficiency payments will be made.

**B. The Types of Crops Which May Not be Planted on Flexible Acres**

Section 504 of the 1949 Act states that producers may plant crops other than the program crop on up to 25 percent of any participating crop acreage base. This acreage is known as "flexible" acreage.

Crops that may be planted on flexible acreage are: (1) Any program crop; (2) any oilseed crop; (3) any other crop, except any fruit or vegetable crop (including potatoes, dry edible beans, lentils and peas); and (4) mung beans. The planting of certain fruits or vegetables may be permitted if such crop is an industrial or experimental crop, or no substantial domestic production or market exists for the crop. The planting of any crop on flexible acres may also be prohibited.

CCC will permit the same crops to be grown on flexible acreage in 1992 as were allowed in 1991. Technical corrections provide that the production of mung beans be allowed on flexible acreage, therefore, mung beans will be allowed on flexible acreage. In States where proportionate shares may go into effect, producers must determine if sugarcane planted on flexible acreage

will receive planting credit for historical planting credit or credit for proportionate shares.

**C. Whether the TOP Will be Implemented**

Sections 107B(e)(3), 105B(e)(3), 103B(e)(3), and 101B(e)(3) of the 1949 Act, with respect to wheat, feed grains, upland cotton, or rice, provide that if an acreage limitation program is in effect, the Secretary may offer producers the option of increasing or decreasing the acreage reduction level, within certain restrictions, with a corresponding decrease or increase in the target price. The target price may be decreased or increased by not less than 0.5 percent nor more than 1 percent for each percentage point change in the acreage reduction level. The acreage limitation requirement cannot be increased by more than 15 percentage points or above 25 percent total for wheat; more than 10 percentage points or above 20 percent of the total for feed grains; more than 10 percentage points or above 25 percent of the total for cotton; and more than 5 percentage points for rice. The decrease in the acreage limitation requirement for all crops cannot be more than one-half of the announced acreage limitation percentage.

The Secretary shall, to the extent practicable, ensure that the TOP does not have a significant effect on program participation, total production or budget outlays.

The TOP provision will not be implemented for the 1992 crops.

**D. Whether to Permit the Planting of Designated Crops on up to Half of the Announced Acreage Reduction**

Sections 107B(e)(2)(F)(i), 105B(e)(2)(F)(i), 103B(e)(2)(F)(i), and 101B(e)(2)(F)(i) of the 1949 Act, with respect to wheat, feed grains, upland cotton, and rice, provide that the Secretary may permit producers to plant a designated crop on not more than one-half of the reduced acreage on the farm.

The designated crops may be: (a) Any oilseed crop; (b) any industrial or experimental crop designated by CCC; and (c) any other crop, except any fruit or vegetable, (including potatoes and dry edible beans) not designated by the Secretary as (i) an industrial or experimental crop, or (ii) a crop for which no substantial domestic production or market exist. In addition, program crops may not be planted on the reduced acreage on the farm.

If producers on a farm elect to plant a designated crop, the amount of deficiency payments that the producers are otherwise eligible to receive shall be reduced, for each acre that is planted to

the designated crop, by an amount equal to the deficiency payment that would be made with respect to a number of acres of the crop that the Secretary considers appropriate. Such reductions in deficiency payments must be sufficient to ensure that this provision does not increase CCC outlays.

Planting of designated crops on up to one-half of the ACR will not be implemented for the 1992 crop year.

**E. Whether to Permit the Planting of Oats on ACR**

In any crop year that it is determined that projected domestic production of oats will not fulfill the projected domestic demand for oats, CCC: (a) May provide that acreage designated as ACR under the wheat and feed grains programs may be planted to oats for harvest under sections 107B(e)(8) and 105B(e)(8) of the 1949 Act; (b) may make program benefits (including loans, purchases, and payments) available under the annual program for oats under section 105B of the 1949 Act for oats planted on ACR; and (c) shall not make program benefits other than the benefits specified in (b) available to producers with respect to acreage planted to oats under this provision.

The planting of oats on wheat and feed grains ACR for harvest will not be permitted for the 1992 crops.

**F. Whether To Permit Conserving Crops To Be Planted on ACR**

Under sections 107B(e)(4)(B)(iii), 105B(e)(4)(B)(iii), 103B(e)(4)(B)(iii), and 101B(e)(4)(B)(iii) of the 1949 Act, with respect to wheat, feed grains, upland cotton, and rice, producers may be authorized to plant all or any part of the ACR to be planted to sweet sorghum, guar, sesame, castor beans, crambe, plantago ovato, triticale, rye, mung beans, milkweed or other commodity, if the Secretary determines that the production is needed to provide an adequate supply of the commodities, is not likely to increase the cost of the price support program and will not adversely affect farm income.

The planting of conserving crops on ACR will not be implemented for the 1992 crops.

**G. Malting Barley Exemption From Acreage Reduction Requirements**

Under section 105B(p) of the 1949 Act with respect to feed grains, the Secretary may exempt producers of malting barley, as a condition of eligibility for feed grain loans, purchases and payments, from complying with the acreage reduction requirements.



Malting barley will not be exempt from the feed grain acreage reduction requirements for the 1992 crop.

#### 7 CFR Part 1421

The regulations at 7 CFR part 1421 set forth the terms and conditions of the price support programs for wheat, feed grains, rice, farm-stored peanuts, and oilseeds. This final rule amends § 1421.7 to include the 1992 basic price support rates of these commodities.

#### List of Subjects

#### 7 CFR Part 1413

Cotton, Feed grains, Price support programs, Wheat, Rice.

#### 7 CFR Part 1421

Grains, Loan programs/agriculture, Price support programs, Warehouses.

Accordingly, 7 CFR parts 1413 and 1421 are amended as follows:

#### PART 1413—[AMENDED]

1. The authority citation for 7 CFR part 1413 continues to read as follows:

Authority: 7 U.S.C. 1308, 1308a, 1309, 1441-2, 1444-2, 1444f, 1445b-3a, 1461-1469; 15 U.S.C. 714b and 714c.

2. In § 1413.11 paragraphs (a) and (b)(4) are revised to read as follows:

#### § 1413.11 Planting flexibility.

(a) With respect to the 1991 through 1995 crop years, producers may plant for harvest on the established crop acreage base, a commodity, which is other than the program crop for which the crop acreage base was established and receive planted and considered planted credit for such program crop as the result of planting such other crop only if CCC has approved the planting of such other crop as provided in this part.

(b) \* \* \*

(4)(i) For 1991, any other crop, except peanuts, tobacco, wild rice, trees, tree crops, nuts, and fruits and vegetables (including fruits and vegetables grown for seed or ornamentals), which include apples, apricots, arugala, artichokes, asparagus, avocados, babaco papayas, bananas, beans (except soybeans, adzuki, faba, and lupin) beets—other than sugar, blackberries, blueberries, bok choy, boysenberries, broccoli, brussel sprouts, cabbage, calabaza, cauliflower, celeriac, celery, chayote, cherimoyas, canary melon, cantaloupes, cardoon, carrots, casaba melon, cassava, cherries, chinese bitter melon, chicory, chinese cabbage, chinese mustard, chinese water chestnuts, chufes, citron, citron melon, coffee, collards, cowpeas, crabapples, cranberries, crenshaw melon,

cucumbers, currants, daikon, dasheen, dates, eggplant, elderberries, endive, escarole, feijoas, figs, gooseberries, grapefruit, grapes, guavas, honeydew melon, huckleberries, jerusalem artichokes, kale, kiwifruit, kohlrabi, kumquats, leeks, lemons, lentils, lettuce, limequats, limes, loganberries, loquats, mandarins, mangos, marionberries, mulberries, murcotts, mustard greens, nectarines, olallieberries, onions, oranges, okra, olives, papaya, paprika, parsnip, passion fruits, peaches, pears, peas, all peppers, persimmon, persian melon, pineapple, plantain, plumcots, plums, pomegranates, potatoes, prunes, pumpkins, quinces, radiochio, radishes, raisins, rapini, raspberries, rhubarb, rutabaga, santa claus melon, salsify, savory, shallots, spinach, squash, strawberries, Swiss chard, sweet corn, sweet potatoes, tangelos, tangerines, tangos, tangors, taniers, taro root, tomatillo, tomatoes, turnips, turnip greens, watercress, watermelons, white sapote, yam, yu choy.

(ii) For 1992, any other crop, including mung beans, with the exception of melons and those crops listed in paragraph (b)(4)(i) of this section.

\* \* \*

3. In § 1413.54 paragraphs (b), (c)(1), (d), and (e) are revised to read as follows:

#### § 1413.54 Acreage reduction program provisions.

\* \* \*

(b) Targeted option payments shall not be available with respect to the 1991 and 1992 crops of wheat, feed grains, upland cotton, and rice.

(c)(1) Acreage designated as ACR under the 1991 and 1992 wheat, feed grains, upland cotton, and rice programs may not be devoted to oilseeds, industrial or experimental crops, to other program crops, to designated crops, or any other crop and must be devoted to approved uses as otherwise provided in this part.

(d) Paid land diversion program payments shall not be made available to producers of the 1991 and 1992 crops of wheat, feed grains, ELS and upland cotton, and rice.

(e) With respect to the 1991 and 1992 crop years, in order to receive feed grain loans, purchases and payments in accordance with this part and part 1421 of this title, producers of malting barley must comply with the acreage reduction requirements of this part.

4. Section 1413.109 is amended by adding a new paragraph (d) to read as follows:

#### § 1413.109 Timing and calculation of deficiency payments.

\* \* \*

(d) For the 1991 through 1995 crop of wheat, feed grains, upland cotton and rice, if an acreage limitation program is in effect, CCC shall make available 40 percent of the projected final deficiency payments, made in accordance with § 1413.108 as an advance payment to producers in the manner determined and announced by CCC. For the 1992 crop of ELS cotton, no advance deficiency payments shall be made available.

#### PART 1421—[AMENDED]

5. The authority citation for part 1421 continues to read as follows:

Authority: 7 U.S.C. 1421, 1423, 1425, 1441z, 1444f-1, 1445b-3a, 1444c-3, 1445e and 1446f; 14 U.S.C. 714b and 714c.

6. In § 1421.7 paragraph (c) is revised to read as follows:

#### § 1421.7 Adjustment of basic support rates.

\* \* \*

(c) The basic support rates for the wheat, corn, barley, oats, grain sorghum, rye, rice, peanuts, soybean, canola, flaxseed, mustard seed, rapeseed, safflower, and sunflower seed crops are:

- (1)(i) 1991 Wheat—\$2.04 per bushel;
- (ii) 1992 Wheat—\$2.21 per bushel;
- (2)(i) 1991 Corn—1.62 per bushel;
- (ii) 1992 Corn—\$1.72 per bushel;
- (3)(i) 1991 Barley—\$1.32 per bushel;
- (ii) 1992 Barley—\$1.40 per bushel;
- (4)(i) 1991 Oats—\$0.83 per bushel;
- (ii) 1992 Oats—\$0.88 per bushel;
- (5)(i) 1991 Grain Sorghum—\$1.54 per bushel;
- (ii) 1992 Grain Sorghum—\$1.63 per bushel;
- (6)(i) 1991 Rye—\$1.38 per bushel;
- (ii) 1992 Rye—\$1.46 per bushel;
- (7)(i) 1991 Rice—\$6.50 per hundredweight;
- (ii) 1992 Rice—\$6.50 per hundredweight;
- (8) 1991 Peanuts, Quota—\$642.79 per ton; Additional—\$149.75 per ton;
- (9)(i) 1991 Soybeans—\$5.02 per bushel;
- (ii) 1992 Soybeans—\$5.02 per bushel;
- (10)(i) 1991 Canola, flaxseed, mustard seed, rapeseed, safflower, and sunflower seed—0.089 per pound;
- (ii) 1992 Canola, flaxseed, mustard seed, rapeseed, safflower, and sunflower seed—\$0.089 per pound.

Signed April 2, 1992 at Washington, DC.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 92-8198 Filed 4-9-92; 8:45 am]

BILLING CODE 3410-05-M



## 7 CFR Part 1435

## Sugar

**AGENCY:** Commodity Credit Corporation, USDA.

**ACTION:** Interim Rule.

**SUMMARY:** This interim rule amends the regulations at 7 CFR part 1435 with respect to the Sugar Price Support Program which is conducted by the Commodity Credit Corporation (CCC) in accordance with section 206 of The Agricultural Act of 1949, as amended (the 1949 Act). This rule is necessary in order to implement changes made by section 111 of the Food, Agriculture, Conservation, and Trade Act Amendments of 1991 (the 1991 Act). The amendments made by this rule, provide for changes with respect to security interests obtained by CCC and that sugarcane shall also be available for supplementary nonrecourse loans as required by the 1991 Act.

**DATES:** Interim rule effective: April 10, 1992. Comments must be received on or before May 11, 1992, in order to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this interim rule. Comments should be mailed or delivered to Director, Cotton, Grain, and Rice Price Support Division, Agricultural Stabilization and Conservation Service, room 3630, P.O. Box 2415, South Agriculture Building, U.S. Department of Agriculture, Washington, DC 20013. Comments received may be inspected between 9 a.m. and 4:30 p.m., Monday through Friday except holidays, in room 3627, South Agriculture Building, U.S. Department of Agriculture, 14th Street and Independence Avenue, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** David Wolf, Program Specialist, Cotton, Grain, and Rice Price Support Division (CGRD), Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture (USDA), P.O. Box 2415, Washington, DC, telephone (202) 720-4704.

**SUPPLEMENTARY INFORMATION:** This interim rule has been reviewed under USDA procedures established in accordance with Executive Order 12291 and Secretary's Memorandum No. 1512-1 and it has been determined to be "nonmajor" because these program provisions will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local governments, or geographic regions; or

(3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. A regulatory impact analysis is available from the previously mentioned contact.

The title and number of the federal assistance program, as found in the Catalogue of Federal Domestic Assistance, to which this interim rule applies is Commodity Loans and Purchases—10.051.

It has been determined that the Regulatory Flexibility Act is not applicable because the CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rule making with respect to the subject matter of this rule.

It has been determined by an environmental evaluation that the program will have no significant impact on the quality of the human environment.

This program is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, and 48 FR 29115 (June 24, 1983).

Public reporting burden for the information collections contained in this regulation with respect to the sugar price support program is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The information collections have previously been cleared by OMB, and assigned number 0560-0087 and 0560-0093.

Because processors are currently taking actions in order to pledge sugar as collateral for CCC price support loans, it has been determined that this interim rule is effective upon publication in the *Federal Register*. Comments are requested, however, and will be taken into consideration in developing the final rule.

#### Background

The 1949 Act sets forth the statutory authority for CCC price support programs. This interim rule amends 7 CFR part 1435 to provide for administering CCC sugar price support programs.

This rule amends § 1435.6(e)(1) to include sugarcane by providing that notwithstanding any other provision of this part, in areas where CCC determines that sugar beets and

sugarcane normally are harvested during July, August, and September, processors may obtain a loan with respect to sugar from such production and if such loan is repaid by September 30, request a supplemental loan in accordance with § 1435.6(e)(2). Formerly, sugarcane was not included in the above provision.

This rule amends § 1435.9(c) (1) and (2) to provide that security interests obtained by CCC as a result of the execution of security agreements by the processors of sugarcane and sugar beets shall be superior to all statutory and common law liens on raw cane sugar and refined beet sugar in favor of the producers of sugarcane and sugar beets and all prior recorded and unrecorded liens on crops of sugarcane and sugar beets from which the sugar was derived. Formerly, in accordance with § 1435.9(c)(2)i, processors were required to obtain lien waivers unless an opinion was obtained from the State's Attorney General in accordance with § 1435.9(c)(2)ii.

This rule amends § 1435.12(d) to clarify that if there are any liens or encumbrances on sugar pledged as collateral for a price support loan, waivers that fully protect the interests of CCC must still be obtained even though the liens or encumbrances are satisfied from the loan proceeds.

#### List of Subjects in 7 CFR Part 1435

Loan programs-agriculture, Price support programs, Sugar.

Accordingly, 7 CFR part 1435 is amended as follows:

#### PART 1435—SUGAR

1. The authority citation for 7 CFR Part 1435 continues to read as follows:

Authority: 7 U.S.C. 1421, 1423, 1446g; 15 U.S.C. 714b and 714c.

2. In § 1435.6, paragraph (e)(1) introductory text is revised to read as follows:

**§ 1435.6 Availability, disbursement and maturity of loans.**

\* \* \*

(e)(1) Notwithstanding any other provision of this part, in areas where CCC determines that sugar beets or sugarcane that normally is harvested during July, August, and September, a processor may:

\* \* \*

3. In § 1435.7, paragraph (c) is revised to read as follows:

**§ 1435.7 Quantity eligible for loan.**

\* \* \*



(c) The total cumulative quantity of sugar that may be pledged as collateral for a price support loan may not exceed the maximum quantity of sugar eligible to be pledged as loan collateral as determined in § 1435.5(a) and this subpart.

4. In § 1435.9, paragraph (c) is revised to read as follows:

**§ 1435.9 Quality and storage facility requirements.**

(c) The security interests obtained by the Commodity Credit Corporation as a result of the execution of security agreements by the processors of sugarcane and sugar beets shall be superior to all statutory and common law liens on raw cane sugar and refined beet sugar in favor of the producers of sugarcane and sugar beets and all prior recorded and unrecorded liens on the crops of sugarcane and sugar beets from which the sugar was derived.

5. In § 1435.12, paragraph (d) is revised to read as follows:

**§ 1435.12 Miscellaneous provisions.**

(d) If there are any liens or encumbrances on sugar pledged as collateral for a price support loan, waivers that fully protect the interest of CCC must be obtained even though the liens or encumbrances are satisfied from the loan proceeds. No additional liens or encumbrances shall be placed on the sugar after the loan is approved.

Signed April 2, 1992, in Washington, DC.  
Keith D. Bjerke,  
Executive Vice President, Commodity Credit Corporation.  
[FR Doc. 92-8304 Filed 4-9-92; 8:45 am]  
BILLING CODE 3410-05-M

**DEPARTMENT OF TRANSPORTATION**

**Federal Highway Administration**

**23 CFR Part 771**

**RIN 2125-AC**

**Environmental Impact and Related Procedures; Technical Amendment**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Correcting amendment.

**SUMMARY:** This document contains a correction to the final regulation on environmental impact and related procedures in order to properly

designate subordinate paragraphs within a section.

**EFFECTIVE DATE:** April 10, 1992.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Thomas P. Holian, Office of the Chief Counsel, (202)366-1383, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays.

**List of Subjects in 23 CFR Part 771**

Environmental impact statements, Grant programs—transportation, Highways and roads.

The FHWA hereby amends 23 CFR 771.135(n) as set forth below:

**PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES**

1. The authority citation for part 771 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 128, 138, and 315; 49 U.S.C. 303(c), 1602(d), 1604(h) and (i), and 1610; 40 CFR 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

**§ 771.135 [Amended]**

2. Section 771.135 is amended by redesignating paragraphs (n)(i), (ii), and (iii) as paragraphs (n) (1), (2), and (3), respectively.

Issued on: April 2, 1992.  
Steven E. Wermcrantz,  
Chief Counsel.  
[FR Doc. 92-8277 Filed 4-9-92; 8:45 am]  
BILLING CODE 4910-22-M

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

**[T.D. 8408]**

**RIN 1545-AH32**

**Economic Performance Requirement**

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Temporary and final regulations.

**SUMMARY:** This document contains final regulations relating to the requirement that economic performance occur in order for an amount to be incurred with respect to any item of a taxpayer using an accrual method of accounting. This document also rennumbers temporary regulations relating to the economic performance requirement. Changes to the applicable law were made by the Tax Reform Act of 1984. The regulations affect all taxpayers that use an accrual method of accounting and are necessary

to provide them with guidance needed to comply with these changes.

**DATES:** These regulations are effective April 10, 1992. In general, the final regulations apply to liabilities that would, under the law in effect before the enactment of section 461(h), be allowable as a deduction or otherwise incurred after July 18, 1984. In the case of certain liabilities that require payment to another person in order for economic performance to occur, the regulations apply to liabilities that would, but for the enactment of section 461(h), be allowable as a deduction or otherwise incurred for taxable years beginning after December 31, 1991. In the case of the economic performance requirement for certain employee benefit provisions, the final regulations provide that economic performance generally is satisfied to the extent that any amount is otherwise deductible under the provisions and, effective April 10, 1992, the final regulations remove temporary regulations concerning employee benefits.

**FOR FURTHER INFORMATION:**

Contact Linda M. Kroening of the Office of Assistant Chief Counsel (Income Tax and Accounting), on (202) 377-7976 (not a toll-free call), or Robert M. Casey of that office on (202) 566-3637 (not a toll-free call).

**SUPPLEMENTARY INFORMATION:**

**Background**

On June 7, 1990, the Internal Revenue Service published a notice of proposed rulemaking in the *Federal Register* (55 FR 23235) regarding the economic performance requirement of section 461(h). The preamble to that notice contains an explanation of the proposed rules. A public hearing was held on October 22, 1990. After consideration of the public comments regarding the proposed regulations, the regulations are adopted as revised by this Treasury decision.

**Explanation of Statutory Provisions**

Section 461(h) provides that in determining whether an amount has been incurred with respect to any item, the all events test is not treated as met any earlier than when economic performance with respect to the item occurs. Under section 461(h)(4), the all events test is met with respect to any item if all events have occurred which determine the fact of the liability and the amount of the liability can be determined with reasonable accuracy.

Section 461(h) provides that, except as otherwise provided in regulations prescribed by the Secretary, the



following general principles determine when economic performance occurs. In the case of liabilities to provide services and property ("service and property liabilities"), section 461(h) generally provides that economic performance occurs as the services or property is provided. Where the liability of a taxpayer arises out of the use of property, economic performance occurs as the taxpayer uses the property. If the liability of a taxpayer requires payment to another person and arises under a workers compensation act or out of any tort, economic performance occurs as the payments to such person are made. Finally, in the case of any other liability of a taxpayer, economic performance occurs at the time determined under regulations prescribed by the Secretary.

Although section 461(h) generally requires economic performance to occur before an item may be treated as incurred, section 461(h)(3) provides an exception to this general rule for certain recurring items ("the recurring item exception"). If the recurring item exception applies, an item may be treated as incurred in the taxable year before economic performance occurs.

#### Public Comments

##### *Application of Section 461(h) to Items Other Than Deductions*

##### *In general*

The proposed regulations provide that a liability is incurred in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability. The regulations define a liability as any item allowable as a deduction, cost, or expense, except for certain items for which the Code provides alternative timing rules. Thus, section 461(h) applies to allowable deductions and any amount otherwise allowable as a capitalized cost, as a cost taken into account in computing cost of goods sold, as a cost allocable to a long-term contract, or as any other cost or expense.

Commentators argued that the proposed regulations incorrectly apply section 461(h) to cost of goods sold, basis, and certain other exclusions. According to the commentators, Congress did not intend section 461(h) to apply to these items.

The Service and the Treasury Department believe section 461(h) and its legislative history indicate that Congress intended that rules of section 461(h) to apply to both exclusions and deductions. First, section 461(h) and the

all events test codified therein are not limited to deductions. Unlike the old all events test contained in § 1.461-1(a)(2) of the regulations, which applied to determine when an "expense" was "deductible," the all events test in section 461(h)(4) applies to determine when "any time" is "incurred." Second, the legislative history contemplates the application of the economic performance rules to capital items or other items that are not deductible in the year incurred. See H.R. Rep. No. 432 Part 2, 98th Cong., 2d Sess. 1254-55 (1984) (describing the difficulty of applying a discounting mechanism to capital items); see also Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. 262 (1984) (providing an example applying the economic performance rules to highway construction costs, which in 1984 were ordinarily treated as deferred costs). Third, adoption of the commentators' position would unreasonably narrow the scope of the economic performance rules relating to the provision of services and property in sections 461(h)(2) (A) and (B) to items that are merely incidental to the provision of services and property, such as deductible supplies and distribution costs. In view of the statutory language and the legislative history cited above, the Service and the Treasury Department believe that such a narrow application of the economic performance principles is inconsistent with congressional intent. Therefore, the final regulations continue to apply economic performance to both exclusions and deductions.

##### *Subdividers of Real Estate*

Rev. Proc. 75-25, 1975-1 C.B. 720, provides a procedure that allows subdividers of real estate to add the estimated cost of future improvements to the actual cost or other basis of property sold for the purpose of determining gain or loss resulting from the sale. The preamble to the proposed regulations states that because economic performance must occur in order for a liability to be taken into account, "the statute and the regulations override Rev. Proc. 75-25 \* \* \*."

Several commentators suggested that the Service retain the estimated cost allocation rules of Rev. Proc. 75-25. In response, the Service issued Notice 91-4, 1991-1 C.B. 315, to provide interim guidance while the Service studied ways, consistent with the purposes and principles of section 461(h), to address the special circumstances of subdividers of real estate. In general, Notice 91-4 provides that the procedures of Rev. Proc. 75-25 will remain in effect until the

issuance of further rules under section 461(h).

The Service and the Treasury Department believe that the economic performance requirement of section 461(h) applies to the real estate sales described in Rev. Proc. 75-25 and that the allocation rules of Rev. Proc. 75-25 must be changed to reflect the requirements of section 461(h). However, in order to address the special circumstances of real estate developers, the Service is publishing Rev. Proc. 92-29 in 1992-17 I.R.B. (April 27, 1992).

In general, under Rev. Proc. 92-29 subdividers of real estate may request consent to add the estimated cost of future improvements to the basis of property for the purpose of determining gain or loss resulting from the sale. However, the total cost that may be added to the basis of property sold may not exceed the taxpayer's total costs that have been incurred within the meaning of section 461(h) with respect to these improvements. Subdividers that do not request consent as outlined under Rev. Proc. 92-29 may not add the cost of future improvements to the basis of benefitted properties until the costs of the improvements are incurred within the meaning of section 461(h).

Rev. Proc. 92-29 provides an automated procedure under which developers may obtain consent to add the estimated cost of future improvements to the basis of property sold. Moreover, Rev. Proc. 92-29 provides streamlined information reporting requirements for developers using this method of accounting.

##### *Provision of Services or Property*

The proposed regulations provide that if the liability of a taxpayer arises out of the providing of services or property to the taxpayer by another person, economic performance occurs as the services or property is provided. If the liability of a taxpayer requires the taxpayer to provide services or property, economic performance occurs as the taxpayer incurs costs (within the meaning of § 1.446-1(c)(1)(ii)) in satisfying the liability.

Commentators recommended that the final regulations treat payment as economic performance for service or property liabilities. These commentators suggested that in the case of services or property to be provided by the taxpayer, economic performance should occur no later than the date the taxpayer pays a third party to assume the taxpayer's liability to provide the services or property and the third party becomes primarily liable to provide the services or property. Similarly, in the case of



services or property to be provided to the taxpayer by another person, the commentators argued that economic performance should occur no later than the date the taxpayer pays the person that is to provide the services or property.

In support of this "payment trump" rule, commentators have made the following argument: Section 461(h) was enacted to prevent taxpayers from taking undiscounted deductions currently for expenses that are economically incurred in the future. In cases where payment is made in advance of economic performance, the amount of the liability has been properly discounted to its value as of the date of payment. Therefore, the deduction is not overstated, and the policy of section 461(h) is satisfied because the tax result is equivalent to delaying the deduction until the event of economic performance occurs.

The Service and the Treasury Department believe that the policy of section 461(h) would be fulfilled in the case of prepaid liabilities only if the payor and the payee are in the same tax position. By prepaying the liability, the payor has shifted the liability for tax on the investment income generated by the payment to the payee for the period of time between the payment and economic performance. Thus, if the payee is not subject to tax or is subject to tax at a lower rate than the payor, the tax result would not be the equivalent of delaying the deduction until economic performance occurs and the policy of section 461(h) would be frustrated.

Moreover, the legislative history indicates that payment should not, as a general rule, be treated as economic performance. The House Report explains that "(i)f the liability of the taxpayer requires a payment to another person for the providing of service or property to the taxpayer by another person, economic performance occurs when such other person provides the property or services." House Report at 1255. The General Explanation adds that if the liability requires the taxpayer to provide property or perform services, "economic performance generally does not occur as payments are made, except as specifically provided in the Code or regulations." General Explanation at 262. The Service and the Treasury Department have concluded that, although a payment rule is appropriate for certain specific types of liabilities discussed below, the generally applicable payment trump rule requested by the commentators would provide a vehicle for income shifting between taxpayers. Therefore, the

regulations do not adopt the commentators' suggestions.

Thus, except as provided under a special rule described in the next section or in the case of a long-term contract, if the taxpayer's liability arises out of the providing of services or property to the taxpayer by another person, the final regulations provide that economic performance occurs as the services or property is provided to the taxpayer, not when the taxpayer pays for the services or property. Similarly, if the liability of the taxpayer requires the taxpayer to provide services or property, economic performance occurs as the taxpayer incurs costs (within the meaning of § 1.446-1(c)(1)(ii)) in satisfying the liability.

#### The 3 1/2-Month rule

The proposed regulations provide that, for purposes of the economic performance requirement, a taxpayer may treat services or property as provided to the taxpayer as the taxpayer makes payment to the person providing the services or property, but only if the taxpayer can reasonably expect the person to provide the services or property within 3 1/2 months after payment ("the 3 1/2-month rule").

Some commentators suggested that the 3 1/2-month rule be expanded to, for example, 6 months. The Service and the Treasury Department believe that the 3 1/2-month rule appropriately operates to relieve taxpayers of the burdens incident to determining precisely when services and property are provided, while assuring that economic performance occurs within a reasonable time following payment. An extension of the 3 1/2-month rule would undermine the general section 461(h) statutory rule that economic performance must occur before the taxpayer may take an item into account. Accordingly, the final regulations do not adopt this suggestion.

Commentators also said *Example 9* of § 1.461-4(d)(6) of the proposed regulations, which illustrates the 3 1/2-month rule, suggests that an executory contract satisfies the all events test. The examples in the proposed and final regulations are intended to illustrate the principles of economic performance; they are not intended to illustrate all aspects of the all events test. Nevertheless, this example and *Example 8* of § 1.461-4(d)(6) of the proposed regulations are removed from the final regulations to avoid any implication that an executory contract satisfies the all events test.

#### Long-term Contracts

The proposed regulations provide that in the case of a liability of a taxpayer

that arises out of another person's providing services or property to the taxpayer that is an expense attributable to a long-term contract reported on the percentage of completion method, economic performance occurs (i) as services or property is provided to the taxpayer, or, if earlier, (ii) as the taxpayer makes payment in satisfaction of the liability to the person providing the services or property. Commentators expressed concern that the long-term contract rule would accelerate the time at which an expense is incurred under the percentage-of-completion method and, consequently, would accelerate the time for reporting income. They argued that expenses of a long-term contract should be subject to the same rule applicable to other service or property liabilities, i.e., economic performance should occur when the services or property is provided to the taxpayer. Alternatively, other commentators argued that economic performance with respect to expenses of a long-term contract should occur on the later of (i) the date that the services or property is provided to the taxpayer, or (ii) the date that payment is made in satisfaction of the liability to the person providing the services or property.

The Service and the Treasury Department believe that the economic performance rule contained in the proposed regulations will not result in an acceleration of income under the percentage of completion method. That is, income recognized under the rule contained in the proposed regulations will not exceed the income that would be recognized by applying the all events test without economic performance. Moreover, the rule is necessary to prevent a deferral of income recognition under the percentage of completion method. Therefore, the final regulations do not adopt the commentators' suggestion.

#### Employee Benefit Plans

In the preamble to the proposed regulations, the Service invited comments on the interaction between the economic performance requirement and employee benefit provisions, including sections 83 (property transferred in connection with the performance of services), 404 (employer contributions to a plan of deferred compensation), and 419 (welfare benefit funds). In addition, the proposed regulations would remove § 1.461(h)-4T, which in general provides that economic performance occurs for a contribution or compensation subject to section 404 or section 419 as the taxpayer makes the contribution or pays the compensation.



Commentators suggested that the final regulations retain the rules contained in § 1.461(h)-4T.

The Service and the Treasury Department believe that the specific timing rules contained in section 404, section 404A, and section 419 generally should take precedence over the more general economic performance rules. Therefore, the final regulations remove § 1.461(h)-4T and provide that, except as provided in any regulation, revenue procedure, or revenue ruling, the economic performance requirement is satisfied to the extent that any amount is otherwise deductible under section 404, section 404A, or section 419.

#### Property Transferred in Connection With Services

Section 83(h) provides that a deduction for property transferred for the performance of services is generally taken in the taxable year in which the service provider includes the value of the property in income. The proposed regulations, however, would allow a deduction for the transfer only upon the later of the satisfaction of the section 83 requirements or the occurrence of economic performance. In many cases, this "later of" rule would not delay the deduction beyond the period provided under section 83(h) because economic performance would occur earlier than or coincident with the recognition of income by the service provider. Economic performance could delay the deduction, however, in cases where the service provider recognizes income prior to the performance of the services. For example, where the service provider makes an election under section 83(b) to accelerate recognition on property that is not substantially vested until the related services are performed, the proposed regulations would delay the deduction under section 83(h) until the period in which the services are performed.

The final regulations do not address the interaction between section 461(h) and section 83. Although comments on section 83 were specifically requested in the preamble to the proposed regulations, few comments were received. The Service and the Treasury Department believe, however, that there may be cases in which the specific timing rules in section 83(h) should take precedence over the more general economic performance rules, such as where an employee makes a section 83(b) election to recognize income on property that is not substantially vested. On the other hand, the Service and the Treasury Department are concerned that there are also cases, particularly those involving nonemployees, in which

taxpayers would be able to frustrate the policy of section 461(h) merely by transferring to a service provider property that is subject to section 83 rather than cash. (See *Provision of Service or Property* above for a discussion of the policy of section 461(h).)

Therefore, the final regulations specifically reserve on the interaction between section 461(h) and section 83, and the Service and the Treasury Department once again invite comments on this subject. In particular, comments are requested as to those cases in which it would be appropriate for section 83(h) to govern exclusively the timing of deductions.

#### Use of Property by the Taxpayer

The proposed regulations provide that if the liability of a taxpayer arises out of the use of property by the taxpayer, economic performance occurs ratably over the period of time the taxpayer is entitled to use the property. Several commentators suggested modifications to this ratable rule in the case of liabilities for the use of property that are measured by events or conditions other than the passage of time.

The final regulations address the commentators' suggestion by providing two exceptions to the ratable rule. Under the first exception, if a liability varies with the frequency of use of the property, economic performance occurs as the property is used. For example, if a five-year lease obligates the taxpayer to pay an amount for each time a machine is used, economic performance occurs each time the taxpayer uses the machine. Under the second exception, if a liability depends on the income earned from the property, economic performance occurs as the income is earned. For example, if a five-year lease obligate the taxpayer to pay an amount based on a percentage of the gross profits generated by the property, economic performance occurs as gross profit from the property is earned by the taxpayer.

Commentator asked that the regulations clarify the relationship between section 461(h) and section 467, which concerns the accrual method of accounting for certain payments for the use of services or property. The Service and the Treasury Department believe that the interaction of sections 461(h) and 467 should be addressed in a regulations project under section 467. Accordingly, the final regulations do not address this issue.

#### Notional Principal Contracts

The term "notional principal contract" generally describes an agreement

between two parties to exchange payments calculated by reference to a notional principal amount. The term typically encompasses interest rate swap agreements, commodity swap agreements, interest rate cap and floor agreements, currency swap agreements and other similar contracts.

The proposed regulations reserved on notional principal contracts. On July 10, 1991, the Internal Revenue Service published a notice of proposed rulemaking in the *Federal Register* (56 FR 31350) concerning the application of section 446 with respect to notional principal contracts. The section 446 proposed regulations contain rules concerning the application of economic performance to notional principal contracts. As a result, these final regulations reserve on notional principal contracts.

#### Payment Liabilities Generally

##### Scope of the Rules

Section 1.461-4(g) of the proposed regulations identifies six types of liabilities, in addition to liabilities arising under a workers compensation act or out of any tort, for which payment constitutes economic performance. These liabilities are (1) Liabilities arising out of a breach of contract; (2) liabilities arising out of a violation of law; (3) rebates and refunds; (4) awards, prizes, and jackpots; (5) amounts paid for insurance, warranty, and service contracts; and (6) taxes other than creditable foreign taxes. The proposed regulations also provide that if section 461(h) or the regulations thereunder do not otherwise provide economic performance rules for a liability (an "other" liability of § 1.461-4(g)(7)), economic performance occurs as payment is made to the person to which the liability is owed.

Commentator objected to the rules in the proposed regulations making payment economic performance for liabilities other than liabilities arising under a workers compensation act or out of any tort. For example, in the case of liabilities for property taxes, some commentators argued that economic performance should occur on the lien date or the assessment date. Commentators also argued that liabilities to provide prizes, awards, or jackpots are service liabilities arising from the provision of entertainment services and that economic performance occurs with respect to these liabilities as the entertainment services are provided (i.e., using the rules for service liabilities).



The Service and the Treasury Department have concluded that payment is the appropriate time for economic performance to occur for these "payment liabilities." The payment rule was chosen because of the nature of the liabilities and the difficulty in applying the statutory rules to these liabilities. For example, in the case of liabilities arising out of a breach of contract or violation of law, it is often difficult to distinguish among actions based on breach of contract, violation of law, and tort because many such actions are brought on alternative grounds and settled without any objective determination of the prevailing theory. In the case of certain awards and prizes, payment is often the most objective evidence of performance. In the case of jackpots, a prolonged period may elapse between the date the value of the jackpot is determined and the date it is paid. In each of these cases, the payment rule protects against overstatement of the deduction and provides an objective rule for determining when economic performance occurs.

In prescribing rules for the listed payment liabilities, other than liabilities arising under a workers compensation act or out of any tort, the Service exercised its broad regulatory authority provided by section 461(h). Section 461(h)(2)(D) authorizes the Secretary to issue regulations that determine the time for economic performance in the case of liabilities for which section 461(h) does not expressly provide rules. Moreover, section 461(h)(2) authorizes the Secretary to issue regulations that change the time for economic performance in the case of liabilities for which section 461(d)(2) expressly provides rules. Thus, the final regulations retain the payment rule for the liabilities in § 1.461-4(g). However, the final regulations provide that, in the case of these liabilities, the Service may issue alternative or additional rules by regulation, revenue procedure, or revenue ruling.

#### Definition of Payment

The proposed regulations provide that "payment" has the same meaning as it has for taxpayers using the cash receipts and disbursement method of accounting. Under the proposed regulations, payment does not include an amount transferred as a loan, refundable deposit, or contingent payment with respect to which the taxpayer may be or may become entitled to receive a refund or credit.

Commentators expressed concern about whether the proposed regulations were intended to change the meaning of

payment for cash method taxpayers. For example, commentators questioned whether a payment of estimated tax, under circumstances that would give rise to a deduction for a cash method taxpayer, would be considered a payment for purposes of the economic performance requirement in light of the possibility that part of the estimated tax might be refunded or credited to the taxpayer.

When determining whether payment would have been made by a cash basis taxpayer, the Service intends to follow the law existing at the time of the payment. In response to the commentators' suggestions, the final regulations clarify that the definition of tax payment is determined under the principles of current law; therefore, a payment generally includes estimated tax payments.

Under the proposed regulations, payment does not include the furnishing of a note or other evidence of indebtedness of the taxpayer. Commentators objected to this rule and asked that the regulations provide that the furnishing of a taxpayer's note or other evidence of indebtedness is payment if the debt bears an arms'-length rate of interest and the recipient of the debt is an accrual method taxpayer. Other commentators recommended that the furnishing of the taxpayer's debt be treated as payment whether or not the recipient is an accrual method taxpayer.

The Service and the Treasury Department believe that consistent use of the cash method definition of payment provides an administrable rule that is consistent with congressional intent. Therefore, the final regulations do not adopt either of these suggestions.

#### Payment to the Person to Which the Liability is Owed

In the case of liabilities requiring payment, the proposed regulations provide that economic performance occurs when payment is made to person to which the liability is owed. Generally, a payment to a trust, escrow account, fund, or any person other than the person to which a liability is owed does not constitute economic performance. Commentators recommended that the regulations eliminate the requirement that payment must be made to the person to which the liability is owed. In the case of a liability requiring payment, the commentators argued that economic performance should be satisfied if the taxpayer pays a third party to assume the liability and the third party becomes primarily liable to satisfy the taxpayer's liability.

In the case of liabilities arising under a workers compensation act or out of any tort, section 461(h)(2)(C) provides that economic performance occurs as payments are made to the person to which the liability is owed. As explained above (see Provision of Services or Property), the Service and the Treasury Department believe that the policy of section 461(h) would be frustrated if, by prepaying their liability, taxpayers were permitted to shift the investment income to other taxpayers. The third party payment rule, recommended by commentators, would lead to such a shifting of income between taxpayers. Moreover, the Service and the Treasury Department believe that compliance with and administration of the economic performance rules will be eased by having the same payment rule for all payment liabilities. Therefore, the final rules do not adopt the commentators' recommendation.

#### Payment in the Case of Liabilities That are Assumed in Connection With the Sale of a Trade or Business

Section 1.461-4(g)(1)(ii)(C) of the proposed regulations provides that if, in connection with the sale or exchange of an entire trade or business by a taxpayer, the purchaser expressly assumes a payment liability arising out of the trade or business that the taxpayer (but for the economic performance requirement) would have been entitled to incur as of the date of the sale, the taxpayer is deemed to make payments with respect to the liability as the amount of the liability is included in the amount realized on the transaction by the taxpayer.

One commentator recommended that a similar rule be provided in the case of service and property liabilities expressly assumed by the purchaser of the taxpayer's trade or business and properly included in the amount realized from the sale. Acceleration of economic performance in the case of the sale or exchange of an entire trade or business is proper because these sales are often followed by liquidations of the selling entity. In these cases, but for an acceleration of economic performance, the seller would be precluded from taking into account the liability. Therefore, the regulations adopt this suggestion.

Commentators also recommended that § 1.461-4(g)(1)(ii)(C) be applied to liabilities that are assumed in connection with a sale or exchange of assets representing less than the entire trade or business where the seller is required to include the assumed



liabilities in income. A sale or exchange of these business assets does not present the same liquidation concerns that arise in the context of a sale of an entire trade or business. The Service and the Treasury Department believe that adopting this recommendation could significantly undermine the principles of economic performance by allowing taxpayers to accelerate some business deductions while continuing to own the business. Consequently, the final regulations do not adopt the commentators' recommendation.

Several commentators recommended that § 1.461-4(g)(1)(ii)(C) be applied to contingent liabilities. The Service and the Treasury Department believe that the tax treatment of contingent liabilities should be addressed in a separate regulations project. Accordingly, the final regulations do not adopt the recommendation.

#### *Rebates and Refunds*

The proposed regulations provide that if the liability of a taxpayer is to pay a rebate or refund to another person, economic performance occurs as payment is made to the person to which the liability is owed. Because payment provides the most objective evidence of economic performance for a rebate or refund, this rule provides certainty for taxpayers and is administrable by the Service. Rev. Rul. 63-182, 1963-2 C.B. 194, permits a natural gas utility to deduct the amount to be refunded to customers in the same year the utility includes the supplier refund in income where the taxpayer forwards the refund to its customers within 12 months after receiving the refund. The Conference Report authorizes the Service to provide a rule for natural gas supplier refunds similar to the rule in Rev. Rul. 63-182. H.R. Conf. Rep. No. 881, 98th Cong., 2d Sess. 875-876 (1984), 1984-3 C.B. Vol. 2 129-130.

Commentators have argued that, in the case of public utility refunds, economic performance should not be delayed until payment. With respect to natural gas suppliers, commentators have pointed to the legislative history in support of their position. In the case of other public utility refunds, commentators have argued that there is no reason to distinguish between natural gas suppliers and other public utilities.

The potential for mismatching is present for all payors of refunds, and the Service and the Treasury Department are not convinced that refunds by public utilities should be treated more favorably than refunds by other taxpayers. However, the recurring item exception provides relief to all public utilities where refunds are paid within a

reasonable period following receipt of the related income. The Service and the Treasury Department believe the recurring item exception carries out the legislative intent with respect to public utility rebates without creating inequities in the treatment of other rebates. Therefore, the final regulations do not provide any special rules for natural gas suppliers or other public utilities.

#### *Insurance*

Section 1.461-4(g)(5) of the proposed regulations provides that if the liability of the taxpayer arises out of the provision to the taxpayer of insurance, economic performance occurs as payment is made to the person to which the liability is owed. Several commentators argued that insurance is a service liability and that economic performance should occur ratably over the term of the insurance. Other commentators questioned whether, in the case of insurance premiums that are subject to adjustment after the close of the taxable year, an amount paid would be treated as a contingent payment and thereby not satisfy economic performance. The final regulations provide that "payment" has the same meaning as it has for taxpayers using the cash receipts and disbursements method of accounting. In making this determination, the law applicable at the time of payment is applied. See, e.g., Rev. Rul. 83-66, 1983-1 C.B. 43, which addresses the treatment of premiums based on the best actuarial estimate that are subject to subsequent refund. Moreover, it is intended that, in determining the amount of the liability with respect to which economic performance has occurred during the taxable year, a taxpayer that has made a premium payment may treat economic performance as occurring with respect to that portion of the taxpayer's liability covered by the payment that can be computed with reasonable accuracy. With these clarifications in the term payment, the Service and the Treasury Department believe payment treatment provides an objective, equitable, and administrable economic performance rule in the context of insurance liabilities.

Several commentators asked that the regulations clarify that economic performance occurs when a taxpayer pays an insurance premium for insurance to cover workers compensation or tort liabilities. The Service believes that *Example 8* of proposed regulations § 1.461-4(g)(8), which is retained as *Example 6* in the final regulations, adequately addresses this situation.

Several commentators indicated that *Example 6* of § 1.461-4(g)(8) of the proposed regulations might suggest that multi-period insurance liabilities incurred during the taxable year are currently deductible. Proposed regulation section 1.461-1(a)(2)(i) provides that section 461(h) and the regulations thereunder merely provide rules for determining when a liability may be treated as incurred under the all events test. Other rules determine the manner in which the liability is taken into account for Federal income tax purposes. For example, a liability that relates to the creation of an asset having a useful life extending substantially beyond the close of the taxable year is taken into account in the taxable year incurred through capitalization. In order to avoid confusion concerning multi-period insurance liabilities, *Example 6* of the proposed regulations has been removed from the final regulations. Other examples in § 1.461-4(g)(8) illustrate the interaction of economic performance with the capitalization provisions.

#### *Taxes*

The regulations provide that economic performance for a tax liability occurs as the tax is paid to the governmental authority that imposed the tax. Commentators argued that the lien date or assessment date should be retained as the time economic performance occurs for real property taxes.

The payment rule is necessary for tax liabilities because a prolonged period may elapse between the lien or assessment date and the date the taxes are paid. The Service and the Treasury Department believe that in these cases treating economic performance as occurring on the lien or assessment date would overstate the true cost of the expense and, consequently, fail to implement the principles of economic performance. Therefore, the final regulations retain payment as the time economic performance occurs for real property taxes.

Commentators suggested that the Service provide an automatic procedure for making an election under section 461(c) to ratably accrue real property taxes. The Service is publishing Rev. Proc. 92-28 in 1992-17 I.R.B. (April 27, 1992), which provides a simplified procedure for making or revoking an election under section 461(c) for a taxpayer's first taxable year beginning after December 31, 1989, December 31, 1990, or December 31, 1991.

Commentators also suggested that the ratable accrual rule of section 461(c) be extended to personal property taxes.



The Service will study this suggestion and will provide further guidance if it determines that the rule should apply to personal property taxes.

Section 1.461-4(g)(6)(iii)(B) of the proposed regulations provides that in the case of a liability of a taxpayer for certain taxes that are imposed by the authority of any foreign country or possession of the United States and that are creditable under section 901, economic performance occurs when the requirements of the all events test other than economic performance are met, whether or not the taxpayer elects to credit the taxes under section 901. One commentator asked that this rule be extended to (1) deductible foreign taxes that are noncreditable under section 901 and (2) foreign income taxes creditable by treaty.

Because of the nature of deductible foreign taxes that are noncreditable under section 901, the Service and the Treasury Department believe that an extension of the rule in § 1.461-4(g)(6)(iii)(B) to noncreditable foreign taxes is inappropriate. For example, a foreign tax may be noncreditable under section 901 because it is not actually an income tax under United States standards but a levy for a specific economic benefit (e.g., a license to extract minerals). As to foreign taxes creditable by treaty, the Service and the Treasury Department believe that the rule in § 1.461-4(g)(6)(iii)(B) applies to those foreign taxes except as otherwise specifically provided by the terms of the applicable treaty. For these reasons, the final regulations do not adopt the commentator's suggestion.

#### *Recurring Item Exception*

##### *Election to Use the Recurring Item Exception*

The proposed regulations require a taxpayer electing the recurring item exception to file a statement identifying the trade or business and the types of items with respect to which the recurring item exception is to be used.

Commentators recommended that a taxpayer be allowed to use the recurring item exception without filing a statement. The final regulations adopt this recommendation: A taxpayer may adopt the recurring item exception for the first taxable year beginning after December 31, 1989, December 31, 1990, or December 31, 1991, by accounting for items under the recurring item method.

##### *Time When Economic Performance Must Occur*

To qualify for recurring item treatment, section 461(h)(3)(A)(ii) provides that economic performance

must occur within the shorter of a reasonable period after the close of the taxable year or 8½ months after the close of the taxable year. The proposed regulations interpret the term "reasonable period" as ending on the date the taxpayer files a timely return for the taxable year. Commentators objected to this interpretation and argued that recurring item treatment should be available for any item otherwise eligible for recurring item treatment if, on the date the taxpayer files its income tax return for the taxable year, the taxpayer reasonably expects economic performance to occur within 8½ months after the end of the taxable year. If economic performance with respect to the item does not occur within 8½ months after the end of the taxable year, the commentators recommended that the regulations provide that the taxpayer file an amended return to take the item into account in the following taxable year.

The final regulations do not adopt the commentators' suggestion. The Service and the Treasury Department believe that the rule in the proposed regulations is a reasonable interpretation of section 461(h)(3)(A)(ii) and ensures that taxpayers deduct only items otherwise eligible for the recurring item exception. Without this rule, a taxpayer might deduct an item in anticipation of economic performance occurring within 8½ months after the end of the taxable year and fail to amend the return if economic performance did not occur within that period.

##### *Liabilities Excluded From Recurring Item Treatment*

Section 461(h)(3)(C) provides that the recurring item exception does not apply to a liability arising under any workers compensation act or out of any tort. Section 1.461-5(c) of the proposed regulations provides that in addition to these liabilities, the recurring item exception does not apply to liabilities for violation of law, breach of contract, interest, or to the "other" liabilities of § 1.461-4(g)(7). Commentators objected to the proposed regulations, arguing that no liabilities other than those specified by section 461(h)(3)(C) may be excluded from the recurring item exception.

The Service and the Treasury Department believe that they may properly exercise their regulatory authority to provide that the timing of economic performance for these payment liabilities is determined without regard to the recurring item exception. (See the discussion of this regulatory authority in *Payment Liabilities Generally, Scope of the Rules.*)

Liabilities for violation of law and breach of contract are excluded from the recurring item exception because they often arise from facts that may also give rise to tort liabilities. Therefore, it may be difficult to determine whether a payment is made pursuant to a liability arising from a tort, a breach of contract, or a violation of law. As noted above, section 461(h)(3)(C) excludes tort and workers compensation liabilities from the recurring item exception. Denying the recurring item exception for all four types of liabilities provides consistent tax treatment for liabilities arising from similar facts, avoids the uncertainty associated with trying to determine the specific type of liability giving rise to the payment, and ensures that congressional intent with respect to the treatment of tort and workers compensation liabilities is carried out.

Congressional intent that economic performance for interest occurs with the passage of time is carried out by denying the recurring item exception for interest. Furthermore, the Service and the Treasury Department believe it is not appropriate to apply the recurring item exception to "other" liabilities without first identifying these liabilities. Nevertheless, the final regulations provide that the Service may issue alternative or additional rules by regulation, revenue procedure, or revenue ruling concerning the "other" liabilities. Accordingly, the final regulations do not adopt the commentators' objection.

##### *Nuclear Fuel Disposal Costs*

The final regulations include the continuing fees required by the Nuclear Waste Policy Act of 1982 among the payment liabilities that automatically satisfy the matching requirement of the recurring item exception.

##### *Estimated Tax and the Recurring Item Exception*

One commentator requested guidance concerning when an item that accrues in year 1 by satisfying the recurring item exception in year 2 should be taken into account for purposes of the annualization exception to the estimated tax payment requirement. The Service and the Treasury Department believe that this issue is more appropriately addressed in guidance issued under section 6655 concerning the annualization exception to the estimated tax payment requirement. Accordingly, the final regulations do not address this issue.



### Cut-Off Method of Change

Commentators asked whether a taxpayer that uses the cut-off method to change its method of accounting for an item in order to satisfy the economic performance requirement may also use the cut-off method to change to the recurring item exception with respect to the item. The regulations clarify that when a taxpayer uses the cut-off method to change its method of accounting for an item in order to satisfy the economic performance requirement, it must also use that method to change to the recurring item exception for the item.

### Use of the Recurring Item Exception for Open Years

The proposed regulations provide that if a taxpayer has incurred a type of liability prior to its first taxable year beginning after December 31, 1989, the taxpayer is granted the Commissioner's consent to change to the recurring item exception method of accounting for that type of liability, but only for its first taxable year beginning after December 31, 1989. Commentators questioned the application of this rule in the case of a failure to properly change to the recurring item exception for taxable years beginning before January 1, 1990.

In response to these questions, the final regulations provide that any taxpayer is granted consent to change to the recurring item exception method (or to modify a previous election to use the recurring item exception method) for the first taxable year beginning after December 31, 1991. In lieu of an election statement or a Form 3115, the final regulations allow taxpayers to change to the recurring item exception method (or to modify a previous election to use the recurring item exception method) by accounting for the item under the recurring item exception method on the timely filed original return for the first taxable year beginning after December 31, 1991. This change in method may be made using either the cut-off method or the full-year change method described in § 1.461-7T. A taxpayer that wishes to change its method of accounting to or from the recurring item exception method for subsequent years, must request the advance consent of the Commissioner pursuant to § 1.446-1(e)(3)(i) and Rev. Proc. 92-20, 1992-12 I.R.B. 10 (March 23, 1992). In addition, rules similar to those for the first taxable year beginning after December 31, 1991, also apply for the first taxable year beginning after December 31, 1989, or the first taxable year beginning after December 31, 1990, where the taxpayer properly used the recurring item exception method on its original return

for the taxable year or on an amended return for the taxable year, provided the amended return is filed on or before October 7, 1992.

### Qualified Funds

Under section 468B, payment to a designated settlement fund constitutes economic performance in the case of certain tort liabilities. The proposed regulations extend the availability of section 468B treatment to certain other payment liabilities by providing that a payment to a "qualified fund" constitutes economic performance in the case of those liabilities. The Service and the Treasury Department have addressed the issues relating to qualified funds in the proposed regulations issued under section 468B. Therefore, the final regulations do not include rules for qualified funds.

### Contested Liabilities and 461(f) Funds

The proposed regulations provide rules relating to the taxation of amounts transferred to an escrowee, trustee, or court in connection with a contested liability within the meaning of section 461(f) (i.e., a transfer to a "461(f) fund"). Commentators provided numerous comments concerning the proposed regulations. After reviewing these comments, the Service and the Treasury Department believe it is appropriate to address economic performance for 461(f) funds after final guidance is provided concerning funds under section 468B. Therefore, the final regulations reserve the treatment of 461(f) funds.

### Effective Dates

In general, the final regulations apply to liabilities that would, under the law in effect before the enactment of section 461(h), be allowable as a deduction or otherwise incurred after July 18, 1984. In the case of certain liabilities that require payment to another person in order for economic performance to occur, the regulations apply to liabilities that would, but for the enactment of section 461(h), be allowable as a deduction or otherwise incurred for taxable years beginning after December 31, 1991.

As to items with respect to which rules are not expressly provided under section 461(h), commentators requested that the regulations provide guidance for their treatment during the period from the effective date of section 461(h) to the effective date of the section 461(h) regulations ("the gap period"). In particular, they requested that taxpayers be allowed to rely on prior rulings to determine the time at which an item is incurred. If there is no ruling addressing an item, commentators requested that taxpayers be allowed to determine the

time at which the item is incurred using the rules of the all events test without regard to economic performance or, alternatively, using the payment rules in the regulations.

Unlike its treatment of most new Code sections, Congress indicated that in the case of section 461(h), taxpayers could continue to rely on prior rulings and regulations until regulations are issued under section 461(h). However, Congress also indicated that taxpayer reliance should be limited to those instances in which the rulings and regulations are not inconsistent with the general principles of economic performance or with the exception for recurring items that is in the Code. Conference Report at 876. This limitation appears in the preamble of the proposed regulations. The Service and the Treasury Department believe that the language of the Conference Report provides the best guidance concerning treatment of items during the gap period. For example, in Notice 90-64, 1990-2 C.B. 347, the Service applied this guidance to the accrual of property taxes. Thus, the final regulations do not adopt the commentators' request.

Commentators believed that the examination restriction of section 4 of Rev. Proc. 84-74, 1984-2 C.B. 736, which precludes a taxpayer that has been contacted for examination from making certain accounting method changes, should not apply to changes under section 461(h). Other commentators recommended that the final regulations adopt rules similar to those provided in Rev. Proc. 90-36, 1990-2 C.B. 357. Under Rev. Proc. 90-36, a taxpayer that has been contacted for examination is precluded from making a change in method of accounting only if the taxpayer has received written notification indicating that an adjustment is being proposed to the method of accounting. The final regulations do not contain an examination restriction for accounting method changes under the regulations to comply with the long-term contract rules, the payment liability rules, or the recurring item exception.

### Special Analyses

It has been determined that these final rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, an initial Regulatory Flexibility Analysis is not



required. Pursuant to section 7805(f) of the Internal Revenue Code, a copy of the rules was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### Drafting Information

The principal authors of these regulations are Robert M. Casey and Linda M. Kroening of the Office of Chief Counsel, Internal Revenue Service. Other personnel from the Service and Treasury Department also participated in their development.

#### List of Subjects

##### 26 CFR 1.61-1 through 1.67-4T

Income taxes, Reporting and recordkeeping requirements.

##### 26 CFR 1.261-1 through 1.289H-1T

Income taxes, Reporting and recordkeeping requirements.

##### 26 CFR 1.446-1 through 1.469-11T

Accounting, Income taxes, Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

**Paragraph 1:** The authority citation for part 1 is amended by removing the following citation:

Section 1.461-3T also issued under 26 U.S.C. 461(h).

**Par. 2.** The authority citation for part 1 is further amended by adding the following citations:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805.

§ 1.446-1 also issued under 26 U.S.C. 461(h).

§ 1.461-1 also issued under 26 U.S.C. 461(h).

§ 1.461-2 also issued under 26 U.S.C. 461(h).

§ 1.461-4 also issued under 26 U.S.C. 461(h).

§ 1.461-4(d) also issued under 26 U.S.C. 460 and 26 U.S.C. 461(h).

§ 1.461-5 also issued under 26 U.S.C. 461(h).

§ 1.461-6 also issued under 26 U.S.C. 461(h).

§ 1.461-7T also issued under 26 U.S.C. 461(h).

**Par. 3.** Section 1.61-3 is amended by adding a new sentence at the end of paragraph (a) to read as follows:

#### § 1.61-3 Gross income derived from business.

(a) \* \* \* Thus, for example, an amount cannot be taken into account in the computation of cost of goods sold any earlier than the taxable year in which economic performance occurs

with respect to the amount (see § 1.446-1(c)(1)(ii)).

**Par. 4.** Section 1.263(a)-1 is amended by adding new text to the end of paragraph (b) to read as follows:

#### § 1.263(a)-1 Capital expenditures; in general.

(b) \* \* \* An amount referred to in paragraph (a) of this section is a capital expenditure that is taken into account through inclusion in inventory costs or a charge to capital accounts or basis no earlier than the taxable year during which the amount is incurred within the meaning of § 1.446-1(c)(1)(ii). Capital expenditures are subsequently recovered through depreciation, amortization, cost of goods sold, as an adjustment to basis, or otherwise, at such time as the property to which the amount relates is used, sold, or otherwise disposed of by the taxpayer, in accordance with applicable Code sections and guidance published by the Secretary.

**Par. 5.** Section 1.263A-1T is amended by adding a new sentence to the end of paragraph (a)(5)(i) to read as follows:

#### § 1.263A-1T Capitalization and inclusion in inventory costs of certain expenses (temporary).

(a) \* \* \*

(5) \* \* \*

(i) \* \* \* However, the amount of any cost required to be capitalized may not be included in inventory or charged to capital accounts or basis beginning any earlier than the taxable year during which the amount is incurred within the meaning of § 1.446-1(c)(1)(ii).

**Par. 6.** Section 1.446-1 is amended by revising paragraph (c)(1)(ii) to read as follows:

#### § 1.446-1 General rule for methods of accounting.

(c) \* \* \*

(1) \* \* \*

(ii) **Accrual method.** (A) Generally, under an accrual method, income is to be included for the taxable year when all the events have occurred that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy. Under such a method, a liability is incurred, and generally is taken into account for Federal income tax purposes, in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable

accuracy, and economic performance has occurred with respect to the liability. (See paragraph (a)(2)(iii)(A) of § 1.461-1 for examples of liabilities that may not be taken into account until after the taxable year incurred, and see §§ 1.461-4 through 1.461-6 for rules relating to economic performance.) Applicable provisions of the Code, the Income Tax Regulations, and other guidance published by the Secretary prescribe the manner in which a liability that has been incurred is taken into account. For example, section 162 provides that a deductible liability generally is taken into account in the taxable year incurred through a deduction from gross income. As a further example, under section 263 or 263A, a liability that relates to the creation of an asset having a useful life extending substantially beyond the close of the taxable year is taken into account in the taxable year incurred through capitalization (within the meaning of § 1.263A-1T(a)(5)), and may later affect the computation of taxable income through depreciation or otherwise over a period including subsequent taxable years, in accordance with applicable Code sections and guidance published by the Secretary.

(B) The term "liability" includes any item allowable as a deduction, cost, or expense for Federal income tax purposes. In addition to allowable deductions, the term includes any amount otherwise allowable as a capitalized cost, as a cost taken into account in computing cost of goods sold, as a cost allocable to a long-term contract, or as any other cost or expense. Thus, for example, an amount that a taxpayer expends or will expend for capital improvements to property must be incurred before the taxpayer may take the amount into account in computing its basis in the property. The term "liability" is not limited to items for which a legal obligation to pay exists at the time of payment. Thus, for example, amounts prepaid for goods or services and amounts paid without a legal obligation to do so may not be taken into account by an accrual basis taxpayer any earlier than the taxable year in which those amounts are incurred.

(C) No method of accounting is acceptable unless, in the opinion of the Commissioner, it clearly reflects income. The method used by the taxpayer in determining when income is to be accounted for will generally be acceptable if it accords with generally accepted accounting principles, is consistently used by the taxpayer from year to year, and is consistent with the



Income Tax Regulations. For example, a taxpayer engaged in a manufacturing business may account for sales of the taxpayer's product when the goods are shipped, when the product is delivered or accepted, or when title to the goods passes to the customers, whether or not billed, depending on the method regularly employed in keeping the taxpayer's books.

Par. 7. Section 1.451-3 is amended by adding a new paragraph (a) (8) to read as follows:

**§ 1.451-3 Long-term contracts.**

(a) \* \* \*

(8) *Incurred.* For purposes of this section, the term "incurred" has the same meaning as in § 1.446-1(c)(1)(ii).

Par. 8. News § 1.461-0 is added to read as follows:

**§ 1.461-0 Table of contents.**

This section lists the captions that appear in the regulations under section 461 of the Internal Revenue Code.

**§ 1.461-1 General Rule for Taxable Year of Deduction**

(a) General rule.

- (1) Taxpayer using cash receipts and disbursements method.
- (2) Taxpayer using an accrual method.
- (3) Effect in current taxable year of improperly accounting for a liability in a prior taxable year.
- (4) Deductions attributable to certain foreign income.
- (b) Special rule in case of death.
- (c) Accrual of real property taxes.
  - (1) In general.
  - (2) Special rules.
  - (3) When election may be made.
  - (4) Binding effect of election.
  - (5) Apportionment of taxes on real property between seller and purchaser.
- (6) Examples.
- (d) Limitation on acceleration of accrual of taxes.
- (e) Dividends or interest paid by certain savings institutions on certain deposits or withdrawable accounts.
  - (1) Deduction not allowable.
  - (2) Computation of amounts not allowed as a deduction.
  - (3) When amounts allowable.

**§ 1.461-2 Contested Liabilities**

- (a) General rule.
  - (1) Taxable year of deduction.
  - (2) Exception.
  - (3) Refunds includible in gross income.
  - (4) Examples.
  - (5) Liabilities described in paragraph (g) of § 1.461-4. [Reserved]
- (b) Contest of asserted liability.
  - (1) Asserted liability.
  - (2) Definition of the term "contest."
  - (3) Example.
- (c) Transfer to provide for the satisfaction of an asserted liability.

- (1) In general.
- (2) Examples.
- (d) Contest exists after transfer.
- (e) Deduction otherwise allowed.
  - (1) In general.
  - (2) Example.
- (f) Treatment of money or property transferred to an escrowee, trustee, or court and treatment of any income attributable thereto. [Reserved]
- (g) Effective dates.

**§ 1.461-3 Prepaid Interest [Reserved]**

**§ 1.461-4 Economic Performance**

- (a) Introduction.
  - (1) In general.
  - (2) Overview.
- (b) Exceptions to the economic performance requirement.
- (c) Definitions.
  - (1) Liability.
  - (2) Payment.
- (d) Liabilities arising out of the provision of services, property, or the use of property.
  - (1) In general.
  - (2) Services or property provided to the taxpayer.
  - (3) Use of property provided to the taxpayer.
  - (4) Services or property provided by the taxpayer.
  - (5) Liabilities that are assumed in connection with the sale of a trade or business.
  - (6) Rules relating to the provision of services or property to a taxpayer.
  - (7) Examples.
- (e) Interest.
- (f) Timing of deductions from notional principal contracts. [Reserved]
- (g) Certain liabilities for which payment is economic performance.
  - (1) In general.
  - (2) Liabilities arising under a workers compensation act or out of any tort, breach of contract, or violation of law.
  - (3) Rebates and refunds.
  - (4) Awards, prizes, and jackpots.
  - (5) Insurance, warranty, and service contracts.
  - (6) Taxes.
  - (7) Other liabilities.
  - (8) Examples.
- (h) Liabilities arising under the Nuclear Waste Policy Act of 1982.
- (i) [Reserved]
- (j) Contingent liabilities. [Reserved]
- (k) Special effective dates.
  - (1) In general.
  - (2) Long-term contracts.
  - (3) Payment liabilities.
- (l) [Reserved]
- (m) Change in method of accounting required by this section.
  - (1) In general.
  - (2) Change in method of accounting for long-term contracts and payment liabilities.

**§ 1.461-5 Recurring Item Exception**

- (a) In general.
- (b) Requirements for use of the exception.
  - (1) General rule.
  - (2) Amended returns.
  - (3) Liabilities that are recurring in nature.
  - (4) Materiality requirement.

- (5) Matching requirement.
- (c) Types of liabilities not eligible for treatment under the recurring item exception.
- (d) Time and manner of adopting the recurring item exception.
  - (1) In general.
  - (2) Change to the recurring item exception method for the first taxable year beginning after December 31, 1991.
  - (3) Retroactive change to the recurring item exception method.
- (e) Examples.

**§ 1.461-6 Economic Performance When Certain Liabilities are Assigned or are Extinguished by the Establishment of a Fund**

- (a) Qualified assignments of certain personal injury liabilities under section 130.
- (b) Section 468B.
- (c) Payments to other funds or persons that constitute economic performance. [Reserved]
- (d) Effective dates.

**§ 1.461-7T Questions and answers relating to the effective dates of section 461(h).**

Par. 9. Section 1.461-1 is amended by revising paragraph (a)(2) and the heading and text of paragraph (a)(3) to read as follows:

**§ 1.461-1 General rule for taxable year of deduction.**

(a) \* \* \*

(2) *Taxpayer using an accrual method—(i) In General.* Under an accrual method of accounting, a liability (as defined in § 1.446-1(c)(1)(ii)(B)) is incurred, and generally is taken into account for Federal income tax purposes, in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability. (See paragraph (a)(2)(iii)(A) of this section for examples of liabilities that may not be taken into account until a taxable year subsequent to the taxable year incurred, and see §§ 1.461-4 through 1.461-6 for rules relating to economic performance.) Applicable provisions of the Code, the Income Tax Regulations, and other guidance published by the Secretary prescribe the manner in which a liability that has been incurred is taken into account. For example, section 162 provides that the deductible liability generally is taken into account in the taxable year incurred through a deduction from gross income. As a further example, under section 263 or 263A, a liability that relates to the creation of an asset having a useful life extending substantially beyond the close of the taxable year is taken into account in the taxable year incurred through capitalization (within the



meaning of § 1.263A-1T(a)(5)), and may later affect the computation of taxable income through depreciation or otherwise over a period including subsequent taxable years, in accordance with applicable Code sections and guidance published by the Secretary. The principles of this paragraph (a)(2) also apply in the calculation of earnings and profits and accumulated earnings and profits.

(ii) *Uncertainty as to the amount of a liability.* While no liability shall be taken into account before economic performance and all of the events that fix the liability have occurred, the fact that the exact amount of the liability cannot be determined does not prevent a taxpayer from taking into account that portion of the amount of the liability which can be computed with reasonable accuracy within the taxable year. For example, A renders services to B during the taxable year for which A charges \$10,000. B admits a liability to A for \$6,000 but contests the remainder. B may take into account only \$6,000 as an expense for the taxable year in which the services were rendered.

(iii) *Alternative timing rules.* (A) If any provision of the Code requires a liability to be taken into account in a taxable year later than the taxable year provided in paragraph (a)(2)(i) of this section, the liability is taken into account as prescribed in that Code provision. See, for example, section 267 (transactions between related parties) and section 464 (farming syndicates).

(B) If the liability of a taxpayer is subject to section 165 (losses), section 170 (charitable contributions), section 192 (black lung benefit trusts), section 194A (employer liability trusts), section 468 (mining and solid waste disposal reclamation and closing costs), or section 468A(a) (certain nuclear decommissioning costs), the liability is taken into account as determined under that section and not under section 461 or the regulations thereunder.

(C) Section 461 and the regulations thereunder do not apply to any amount allowable under a provision of the Code as a deduction for a reserve for estimated expenses.

(D) Except as otherwise provided in any Internal Revenue regulations, revenue procedure, or revenue ruling, the economic performance requirement of section 461(h) and the regulations thereunder is satisfied to the extent that any amount is otherwise deductible under section 404 (employer contributions to a plan of deferred compensation), section 404A (certain foreign deferred compensation plans), or section 419 (welfare benefit funds). See § 1.461-4(d)(2)(iii).

(3) *Effect in current taxable year of improperly accounting for a liability in a prior taxable year.* Each year's return should be complete in itself, and taxpayers shall ascertain the facts necessary to make a correct return. The expenses, liabilities, or loss of one year generally cannot be used to reduce the income of a subsequent year. A taxpayer may not take into account in a return for a subsequent taxable year liabilities that, under the taxpayer's method of accounting, should have been taken into account in a prior taxable year. If a taxpayer ascertains that a liability should have been taken into account in a prior taxable year, the taxpayer should, if within the period of limitation, file a claim for credit or refund of any overpayment of tax arising therefrom. Similarly, if a taxpayer ascertains that a liability was improperly taken into account in a prior taxable year, the taxpayer should, if within the period of limitation, file an amended return and pay any additional tax due. However, except as provided in section 905(c) and the regulations thereunder, if a liability is properly taken into account in an amount based on a computation made with reasonable accuracy and the exact amount of the liability is subsequently determined in a later taxable year, the difference, if any, between such amounts shall be taken into account for the later taxable year.

Par. 10. Section 1.461-2 is amended by revising the heading, adding and reserving a new paragraph (a)(5), removing paragraphs (f), (g), and (h), adding and reserving a new paragraph (f), and adding new paragraph (g) to read as follows:

**§ 1.461-2 Contested liabilities.**

(a) \* \* \*

(5) *Liabilities described in paragraph (g) of § 1.461-4.* [Reserved]

(f) Treatment of money or property transferred to an escrowee, trustee, or court and treatment of any income attributable thereto. [Reserved]

(g) *Effective dates.* Paragraphs (a) through (e) of this section apply to transfers of money or property made in taxable years beginning after December 31, 1953, and ending after August 16, 1954.

**§ 1.461-3T [Redesignated as § 1.461-7T]**

**§ 1.461(h)-4T [Removed]**

Par. 11. Sections 1.461-3T is redesignated as § 1.461-7T.

**§ 1.461(h)-4T [Removed]**

Par. 12. Section 1.461(h)-4T is removed.

Par. 13. Section 1.461-3 is added and reserved and §§ 1.461-4 through 1.461-6 are added to read as follows:

**§ 1.461-3 Prepaid interest. [Reserved]**

**§ 1.461-4 Economic performance.**

(a) *Introduction—(1) In general.* For purposes of determining whether an accrual basis taxpayer can treat the amount of any liability (as defined in § 1.446-1(c)(1)(ii)(B)) as incurred, the all events test is not treated as met any earlier than the taxable year in which economic performance occurs with respect to the liability.

(2) *Overview.* Paragraph (b) of this section lists exceptions to the economic performance requirement. Paragraph (c) of this section provides cross-references to the definitions of certain terms for purposes of section 461 (h) and the regulations thereunder. Paragraphs (d) through (m) of this section and § 1.461-6 provide rules for determining when economic performance occurs. Section 1.461-5 provides rules relating to an exception under which certain recurring items may be incurred for the taxable year before the year during which economic performance occurs.

(b) *Exceptions to the economic performance requirement.* Paragraph (a)(2)(iii)(B) of § 1.461-1 provides examples of liabilities that are taken into account under rules that operate without regard to the all events test (including economic performance).

(c) *Definitions.* The following cross-references identify certain terms defined for purposes of section 461(h) and the regulations thereunder:

(1) *Liability.* See paragraph (c)(1)(ii)(B) of § 1.446-1 for the definition of "liability."

(2) *Payment.* See paragraph (g)(1)(ii) of this section for the definition of "payment."

(d) *Liabilities arising out of the provision of services, property, or the use of property—(1) In general.* The principles of this paragraph (d) determine when economic performance occurs with respect to liabilities arising out of the performance of services, the transfer of property, or the use of property. This paragraph (d) does not apply to liabilities described in paragraph (e) (relating to interest expense) or paragraph (g) (relating to breach of contract, workers compensation, tort, etc.) of this section. In addition, except as otherwise provided in Internal Revenue regulations, revenue procedures, or revenue rulings this paragraph (d) does not apply to amounts paid pursuant to a notional principal contract. The



Commissioner may provide additional rules in regulations, revenue procedures, or revenue rulings concerning the time at which economic performance occurs for items described in this paragraph (d).

(2) *Services or property provided to the Taxpayer*—(i) *In general.* Except as otherwise provided in paragraph (d)(5) of this section, if the liability of a taxpayer arises out of the providing of services or property to the taxpayer by another person, economic performance occurs as the services or property is provided.

(ii) *Long-term contracts.* In the case of any liability of a taxpayer described in paragraph (d)(2)(i) of this section that is an expense attributable to a long-term contract with respect to which the taxpayer uses the percentage of completion method, economic performance occurs—

(A) As the services or property is provided; or, if earlier,

(B) As the taxpayer makes payment (as defined in paragraph (g)(1)(ii) of this section) in satisfaction of the liability to the person providing the services or property. See paragraph (k)(2) of this section for the effective date of this paragraph (d)(2)(ii).

(iii) *Employee benefits*—(A) *In general.* Except as otherwise provided in any Internal Revenue regulation, revenue procedure, or revenue ruling, the economic performance requirement is satisfied to the extent that any amount is otherwise deductible under section 404 (employer contributions to a plan of deferred compensation), section 404A (certain foreign deferred compensation plans), and section 419 (welfare benefit funds). See § 1.461-1(a)(2)(iii)(D).

(B) *Property transferred in connection with performance of services.* [Reserved]

(iv) *Cross-references.* See Examples 4 through 6 of paragraph (d)(7) of this section. See paragraph (d)(6) of this section for rules relating to when a taxpayer may treat services or property as provided to the taxpayer.

(3) *Use of property provided to the taxpayer*—(i) *In general.* Except as otherwise provided in this paragraph (d)(3)d and paragraph (d)(5) of this section, if the liability of a taxpayer arises out of the use of property by the taxpayer, economic performance occurs ratably over the period of time the taxpayer is entitled to the use of the property (taking into account any reasonably expected renewal periods when necessary to carry out the purposes of section 461(h)). See Examples 6 through 9 of paragraph (d)(7) of this section.

(ii) *Exceptions.* If the liability of a taxpayer arises out of the use of property by the taxpayer and all or a portion of the liability is determined by reference to the frequency or volume of use of the property or the income from the property, economic performance occurs for the portion of the liability determined by reference to the frequency or volume of use of the property or the income from the property as the taxpayer uses the property or includes income from the property. See Examples 8 and 9 of paragraph (d)(7) of this section. This paragraph (d)(3)(ii) shall not apply if the District Director determines, that based on the substance of the transaction, the liability of the taxpayer for use of the property is more appropriately measured ratably over the period of time the taxpayer is entitled to the use of the property.

(4) *Services or property provided by the taxpayer*—(i) *In general.* Except as otherwise provided in paragraph (d)(5) of this section, if the liability of a taxpayer requires the taxpayer to provide services for property to another person, economic performance occurs as the taxpayer incurs costs (within the meaning of § 1.446-1(c)(1)(ii)) in connection with the satisfaction of the liability. See Examples 1 through 3 of paragraph (d)(7) of this section.

(ii) *Barter transactions.* If the liability of a taxpayer requires the taxpayer to provide services, property, or the use of property, and arises out of the use of property by the taxpayer, or out of the provision of services or property to the taxpayer by another person, economic performance occurs to the extent of the lesser of—

(A) The cumulative extent to which the taxpayer incurs costs (within the meaning of § 1.446-1(c)(1)(ii)) in connection with its liability to provide the services or property; or

(B) The cumulative extent to which the services or property is provided to the taxpayer.

(5) *Liabilities that are assumed in connection with the sale of a trade or business*—(i) *In general.* If, in connection with the sale or exchange of a trade or business by a taxpayer, the purchaser expressly assumes a liability arising out of the trade or business that the taxpayer but for the economic performance requirement would have been entitled to incur as of the date of the sale, economic performance with respect to that liability occurs as the amount of the liability is properly included in the amount realized on the transaction by the taxpayer. See § 1.1001-2 for rules relating to the inclusion in amount realized from a

discharge of liabilities resulting from a sale or exchange.

(ii) *Trade or business.* For purposes of this paragraph (d)(5), a trade or business is a specific group of activities carried on by the taxpayer for the purpose of earning income or profit if every operation that is necessary to the process of earning income or profit is included in the group. Thus, for example, the group of activities generally must include the collection of income and the payment of expenses.

(iii) *Tax avoidance.* This paragraph (d)(5) does not apply if the District Director determines that tax avoidance is one of the taxpayer's principal purposes for the sale or exchange.

(6) *Rules relating to the provision of services or property to a taxpayer.* The following rules apply for purposes of this paragraph (d):

(i) Services or property provided to a taxpayer include services or property provided to another person at the direction of the taxpayer.

(ii) A taxpayer is permitted to treat services or property as provided to the taxpayer as the taxpayer makes payment to the person providing the services or property (as defined in paragraph (g)(1)(ii) of this section), if the taxpayer can reasonably expect the person to provide the services or property within 3½ months after the date of payment.

(iii) A taxpayer is permitted to treat property as provided to the taxpayer when the property is delivered or accepted, or when title to the property passes. The method used by the taxpayer to determine when property is provided is a method of accounting that must comply with the rules of § 1.446-1(e). Thus, the method of determining when property is provided must be used consistently from year to year, and cannot be changed without the consent of the Commissioner.

(iv) If different services or items of property are required to be provided to a taxpayer under a single contract or agreement, economic performance generally occurs over the time each service is provided and as each item of property is provided. However, if a service or item of property to be provided to the taxpayer is incidental to other services or property to be provided under a contract or agreement, the taxpayer is not required to allocate any portion of the total contract price to the incidental service or property. For purposes of this paragraph (d)(6)(iv), services or property is treated as incidental only if—

(A) The cost of the services or property is treated on the taxpayer's



books and records as part of the cost of the other services or property provided under the contract; and

(B) The aggregate cost of the services or property does not exceed 10 percent of the total contract price.

(7) *Examples.* The following examples illustrate the principles of this paragraph (d). For purposes of these examples, it is assumed that the requirements of the all events test other than economic performance have been met, and that the recurring item exception is not used.

*Example 1. Services or property provided by the taxpayer.* (i) X corporation, a calendar year, accrual method taxpayer, is an oil company. During March 1990, X enters into an oil and gas lease with Y. In November 1990, X installs a platform and commences drilling. The lease obligates X to remove its offshore platform and well fixtures upon abandonment of the well or termination of the lease. During 1998, X removes the platform and well fixtures at a cost of \$200,000.

(ii) Under paragraph (d)(4)(i) of this section, economic performance with respect to X's liability to remove the offshore platform and well fixtures occurs as X incurs costs in connection with that liability. X incurs these costs in 1998 as, for example, X's employees provide X with removal services (see paragraph (d)(2) of this section). Consequently, X incurs \$200,000 for the 1998 taxable year. Alternatively, assume that during 1990 X pays Z \$130,000 to remove the platform and fixtures, and that Z performs these removal services in 1998. Under paragraph (d)(2) of this section, X does not incur this cost until Z performs the services. Thus, economic performance with respect to the \$130,000 X pays Z occurs in 1998.

*Example 2. Services or property provided by the taxpayer.* (i) W corporation, a calendar year, accrual method taxpayer, sells tractors under a three-year warranty that obligates W to make any reasonable repairs to each tractor it sells. During 1990, W sells ten tractors. In 1992 W repairs, at a cost of \$5,000, two tractors sold during 1990.

(ii) Under paragraph (d)(4)(i) of this section, economic performance with respect to W's liability to perform services under the warranty occurs as W incurs costs in connection with that liability. W incurs these costs in 1992 as, for example, replacement parts are provided to W (see paragraph (d)(2) of this section). Consequently, \$5,000 is incurred by W for the 1992 taxable year.

*Example 3. Services or property provided by the taxpayer; Long-term contracts.* (i) W corporation, a calendar year, accrual method taxpayer, manufactures machine tool equipment. In November 1992, W contracts to provide X corporation with certain equipment. The contract is not a long-term contract under section 460 or § 1.451-3. In 1992, W pays Z corporation \$50,000 to lease from Z, for the one-year period beginning on January 1, 1993, testing equipment to perform quality control tests required by the agreement with X. In 1992, pursuant to the terms of a contract, W pays Y corporation \$100,000 for certain parts necessary to

manufacture the equipment. The parts are provided to W in 1993. W's employees provide W with services necessary to manufacture the equipment during 1993, for which W pays \$150,000 in 1993.

(ii) Under paragraph (d)(4) of this section, economic performance with respect to W's liability to provide the equipment to X occurs as W incurs costs in connection with that liability. W incurs these costs during 1993, as services, property, and the use of property necessary to manufacture the equipment are provided to W (see paragraphs (d)(2) and (d)(3) of this section). Thus, \$300,000 is incurred by W for the 1993 taxable year. See section 263A and the regulations thereunder for rules relating to the capitalization and inclusion in inventory of these incurred costs.

(iii) Alternatively, assume that the agreement with X is a long-term contract as defined in section 460(f), and that W takes into account all items with respect to such contracts under the percentage of completion method as described in section 460(b)(1). Under paragraph (d)(2)(ii) of this section, the \$100,000 W pays in 1992 for parts is incurred for the 1992 taxable year, for purposes of determining the percentage of completion under section 460(b)(1)(A). W's other costs under the agreement are incurred for the 1993 taxable year for this purpose.

*Example 4. Services or property provided to the taxpayers.* (i) LP1, a calendar year, accrual method limited partnership, owns the working interest in a parcel of property containing oil and gas. During December 1990, LP1 enters into a turnkey contract with Z corporation pursuant to which LP1 pays Z \$200,000 and Z is required to provide a completed well by the close of 1992. In May 1992, Z commences drilling the well, and, in December 1992, the well is completed.

(ii) Under paragraph (d)(2) of this section, economic performance with respect to LP1's liability for drilling and development services provided to LP1 by Z occurs as the services are provided. Consequently, \$200,000 is incurred by LP1 for the 1992 taxable year.

*Example 5. Services or property provided to the taxpayer.* (i) X corporation, a calendar year, accrual method taxpayer, is an automobile dealer. On January 15, 1990, X agrees to pay an additional \$10 to Y, the manufacturer of the automobiles, for each automobile purchased by X from Y. Y agrees to provide advertising and promotional activities to X.

(ii) During 1990, X purchases from Y 1,000 new automobiles and pays to Y an additional \$10,000 as provided in the agreement. Y, in turn, uses this \$10,000 to provide advertising and promotional activities during 1992.

(iii) Under paragraph (d)(2) of this section, economic performance with respect to X's liability for advertising and promotional services provided to X by Y occurs as the services are provided. Consequently, \$10,000 is incurred by X for the 1992 taxable year.

*Example 6. Use of property provided to the taxpayer; services or property provided to the taxpayer.* (i) V corporation, a calendar year, accrual method taxpayer, charters aircrafts. On December 20, 1990, V leases a jet aircraft from L for the four-year period that begins on January 1, 1991. The lease obligates V to pay L a base rental of \$500,000

per year. In addition, the lease requires V to pay \$25 to an escrow account for each hour that the aircraft is flown. The escrow account funds are held by V and are to be used by L to make necessary repairs to the aircraft. Any amount remaining in the escrow account upon termination of the lease is payable to V. During 1991, the aircraft is flown 1,000 hours and V pays \$25,000 to the escrow account. The aircraft is repaired by L in 1993. In 1994, \$20,000 is released from the escrow account to pay L for the repairs.

(ii) Under paragraph (d)(3)(i) of this section, economic performance with respect to V's base rental liability occurs ratably over the period of time V is entitled to use the jet aircraft. Consequently, the \$500,000 rent is incurred by V for the 1991 taxable year and for each of the next three taxable years. Under paragraph (d)(2) of this section, economic performance with respect to the liability to place amounts in escrow occurs as the aircraft is repaired. Consequently, V incurs \$20,000 for the 1993 taxable year.

*Example 7. Use of property provided to the taxpayer.* (i) X corporation, a calendar year, accrual method taxpayer, manufactures and sells electronic circuitry. On November 15, 1990, X enters into a contract with Y that entitles X to the exclusive use of a product owned by Y for the five-year period beginning on January 1, 1991. Pursuant to the contract, X pays Y \$100,000 on December 30, 1990.

(ii) Under paragraph (d)(3)(i) of this section, economic performance with respect to X's liability for the use of property occurs ratably over the period of time X is entitled to use the product. Consequently, \$20,000 is incurred by X for 1991 and for each of the succeeding four taxable years.

*Example 8. Use of property provided to the taxpayer.* (i) Y corporation, a calendar year, accrual method taxpayer, enters into a five-year lease with Z for the use of a copy machine on July 1, 1991. Y also receives delivery of the copy machine on July 1, 1991. The lease obligates Y to pay Z a base rental payment of \$6,000 per year at the beginning of each lease year and an additional charge of 5 cents per copy 30 days after the end of each lease year. The machine is used to make 50,000 copies during the first lease year: 20,000 copies in 1991 and 30,000 copies from January 1, 1992, to July 1, 1992. Y pays the \$6,000 base rental payment to Z on July 1, 1991, and the \$2,500 variable use payment on July 30, 1992.

(ii) Under paragraph (d)(3)(i) of this section, economic performance with respect to Y's base rental liability occurs ratably over the period of time Y is entitled to use the copy machine. Consequently, \$3,000 rent is incurred by Y for the 1991 taxable year. Under paragraph (d)(3)(ii) of this section, economic performance with respect to Y's variable use portion of the liability occurs as Y uses the machine. Thus, the \$1,000 of the \$2,500 variable-use liability that relates to the 20,000 copies made in 1991 is incurred by Y for the 1991 taxable year.

*Example 9. Use of property provided to the taxpayer.* (i) X corporation, a calendar year, accrual method taxpayer, enters into a five-year product distribution agreement with Y,



on January 1, 1992. The agreement provides for a payment of \$100,000 on January 1, 1992, plus 10 percent of the gross profits earned by X from distribution of the product. The variable income portion of X's liability is payable on April 1 of each subsequent year. On January 1, 1992, X pays Y \$100,000. On April 1, 1993, X pays Y \$3 million representing 10 percent of X's gross profits from January 1 through December 31, 1992.

(ii) Under paragraph (d)(3)(i) of this section, economic performance with respect to X's \$100,000 payment occurs ratably over the period of time X is entitled to use the product. Consequently, \$20,000 is incurred by X for each year of the agreement beginning with 1992. Under paragraph (d)(3)(ii) of this section, economic performance with respect to X's variable income portion of the liability occurs as the income is earned by X. Thus, the \$3 million variable-income liability is incurred by X for the 1992 taxable year.

(e) *Interest.* In the case of interest, economic performance occurs as the interest cost economically accrues, in accordance with the principles of relevant provisions of the Code.

(f) *Timing of deductions from notional principal contracts.* [Reserved]

(g) *Certain liabilities for which payment is economic performance*—(1) *In general*—(i) *Person to which payment must be made.* In the case of liabilities described in paragraphs (g) (2) through (7) of this section, economic performance occurs when, and to the extent that, payment is made to the person to which the liability is owed. Thus, except as otherwise provided in paragraph (g)(1)(iv) of this section and § 1.461-6, economic performance does not occur as a taxpayer makes payments in connection with such a liability to any other person, including a trust, escrow account, court-administered fund, or any similar arrangement, unless the payments constitute payment to the person to which the liability is owed under paragraph (g)(1)(ii)(B) of this section. Instead, economic performance occurs as payments are made from that other person or fund to the person to which the liability is owed. The amount of economic performance that occurs as payment is made from the other person or fund to the person to which the liability is owed may not exceed the amount the taxpayer transferred to the other person or fund. For special rules relating to the taxation of amounts transferred to "qualified settlement funds," see section 468B and the regulations thereunder. The Commissioner may provide additional rules in regulations, revenue procedures, and revenue rulings concerning the time at which economic performance occurs for items described in this paragraph (g).

(ii) *Payment to person to which liability is owed.* Paragraph (d)(6) of this section provides that for purposes of paragraph (d) of this section (relating to the provision of services or property to the taxpayer) in certain cases a taxpayer may treat services or property as provided to the taxpayer as the taxpayer makes payments to the person providing the services or property. In addition, this paragraph (g) provides that in the case of certain liabilities of a taxpayer, economic performance occurs as the taxpayer makes payment to persons specified therein. For these and all other purposes of section 461(h) and the regulations thereunder:

(A) *Payment.* The term *payment* has the same meaning as is used when determining whether a taxpayer using the cash receipts and disbursements method of accounting has made a payment. Thus, for example, payment includes the furnishing of cash or cash equivalents and the netting of offsetting accounts. Payment does not include the furnishing of a note or other evidence of indebtedness of the taxpayer, whether or not the evidence is guaranteed by any other instrument (including a standby letter of credit) or by any third party (including a government agency). As a further example, payment does not include a promise of the taxpayer to provide services or property in the future (whether or not the promise is evidenced by a contract or other written agreement). In addition, payment does not include an amount transferred as a loan, refundable deposit, or contingent payment.

(B) *Person to which payment is made.* Payment to a particular person is accomplished if paragraph (g)(1)(ii)(A) of this section is satisfied and a cash basis taxpayer in the position of that person would be treated as having actually or constructively received the amount of the payment as gross income under the principles of section 451 (without regard to section 104(a) or any other provision that specifically excludes the amount from gross income). Thus, for example, the purchase of an annuity contract or any other asset generally does not constitute payment to the person to which a liability is owed unless the ownership of the contract or other asset is transferred to that person.

(C) *Liabilities that are assumed in connection with the sale of a trade or business.* Paragraph (d)(5) of this section provides rules that determine when economic performance occurs in the case of liabilities that are assumed in connection with the sale of a trade or business. The provisions of paragraph (d)(5) of this section also apply to any liability described in paragraph (g) (2) through (7) of this section that the

purchaser expressly assumes in connection with the sale or exchange of a trade or business by a taxpayer, provided the taxpayer (but for the economic performance requirement) would have been entitled to incur the liability as of the date of the sale.

(iii) *Person.* For purposes of this paragraph (g), "person" has the same meaning as in section 7701(a)(1), except that it also includes any foreign state, the United States, any State or political subdivision thereof, any possession of the United States, and any agency or instrumentality of any of the foregoing.

(iv) *Assignments.* If a person that has a right to receive payment in satisfaction of a liability described in paragraphs (g) (2) through (7) of this section makes a valid assignment of that right to a second person, or if the right is assigned to the second person through operation of law, then payment to the second person in satisfaction of that liability constitutes payment to the person to which the liability is owed.

(2) *Liabilities arising under a workers compensation act or out of any tort, breach of contract, or violation of law.* If the liability of a taxpayer requires a payment or series of payments to another person and arises under any workers compensation act or out of any tort, breach of contract, or violation of law, economic performance occurs as payment is made to the person to which the liability is owed. See *Example 1* of paragraph (g)(8) of this section. For purposes of this paragraph (g)(2)—

(i) A liability to make payments for services, property, or other consideration provided under a contract is not a liability arising out of a breach of that contract unless the payments are in the nature of incidental, consequential, or liquidated damages; and

(ii) A liability arising out of a tort, breach of contract, or violation of law includes a liability arising out of the settlement of a dispute in which a tort, breach of contract, or violation of law, respectively, is alleged.

(3) *Rebates and refunds.* If the liability of a taxpayer is to pay a rebate, refund, or similar payment to another person (whether paid in property, money, or as a reduction in the price of goods or services to be provided in the future by the taxpayer), economic performance occurs as payment is made to the person to which the liability is owed. This paragraph (g)(3) applies to all rebates, refunds, and payments or transfers in the nature of a rebate or refund regardless of whether they are characterized as a deduction from gross income, an adjustment to gross receipts



or total sales, or an adjustment or addition to cost of goods sold. In the case of a rebate or refund made as a reduction in the price of goods or services to be provided in the future by the taxpayer, "payment" is deemed to occur as the taxpayer would otherwise be required to recognize income resulting from a disposition at an unreduced price. See *Example 2* of paragraph (g)(8) of this section. For purposes of determining whether the recurring item exception of § 1.461-5 applies, a liability that arises out of a tort, breach of contract, or violation of law is not considered a rebate or refund.

(4) *Awards, prizes, and jackpots.* If the liability of a taxpayer is to provide an award, prize, jackpot, or other similar payment to another person, economic performance occurs as payment is made to the person to which the liability is owed. See *Examples 3 and 4* of paragraph (g)(8) of this section.

(5) *Insurance, warranty, and service contracts.* If the liability of a taxpayer arises out of the provision to the taxpayer of insurance, or a warranty or service contract, economic performance occurs as payment is made to the person to which the liability is owed. See *Examples 5 through 7* of paragraph (g)(8) of this section. For purposes of this paragraph (g)(5)—

(i) A warranty or service contract is a contract that a taxpayer enters into in connection with property bought or leased by the taxpayer, pursuant to which the other party to the contract promises to replace or repair the property under specified circumstances.

(ii) The term "insurance" has the same meaning as is used when determining the deductibility of amounts paid or incurred for insurance under section 162.

(6) *Taxes—(i) In general.* Except as otherwise provided in this paragraph (g)(6), if the liability of a taxpayer is to pay a tax, economic performance occurs as the tax is paid to the governmental authority that imposed the tax. For purposes of this paragraph (g)(6), payment includes payments of estimated income tax and payments of tax where the taxpayer subsequently files a claim for credit or refund. In addition, for purposes of this paragraph (g)(6), a tax does not include a charge collected by a governmental authority for specific extraordinary services or property provided to a taxpayer by the governmental authority. Examples of such a charge include the purchase price of a parcel of land sold to a taxpayer by a governmental authority and a charge for labor engaged in by government employees to improve that parcel. In certain cases, a liability to pay a tax is permitted to be taken into account in the

taxable year before the taxable year during which economic performance occurs under the recurring item exception of § 1.461-5. See *Example 8* of paragraph (g)(8) of this section.

(ii) *Licensing fees.* If the liability of a taxpayer is to pay a licensing or permit fee required by a governmental authority, economic performance occurs as the fee is paid to the governmental authority, or as payment is made to any other person at the direction of the governmental authority.

(iii) *Exceptions—(A) Real property taxes.* If a taxpayer has made a valid election under section 461 (c), the taxpayer's accrual for real property taxes is determined under section 461 (c). Otherwise, economic performance with respect to a property tax liability occurs as the tax is paid, as specified in paragraph (g)(6)(i) of this section.

(B) *Certain foreign taxes.* If the liability of a taxpayer is to pay an income, war profits, or excess profits tax that is imposed by the authority of any foreign country or possession of the United States and is creditable under section 901 (including a creditable tax described in section 903 that is paid in lieu of such a tax), economic performance occurs when the requirements of the all events test (as described in § 1.446-1 (c)(1)(ii)) other than economic performance are met, whether or not the taxpayer elects to credit such taxes under section 901 (a).

(7) *Other liabilities.* In the case of a taxpayer's liability for which economic performance rules are not provided elsewhere in this section or in any other Internal Revenue regulation, revenue ruling or revenue procedure, economic performance occurs as the taxpayer makes payments in satisfaction of the liability to the person to which the liability is owed. This paragraph (g)(7) applies only if the liability cannot properly be characterized as a liability covered by rules provided elsewhere in this section. If a liability may properly be characterized as, for example, a liability arising from the provision of services or property to, or by, a taxpayer, the determination as to when economic performance occurs with respect to that liability is made under paragraph (d) of this section and not under this paragraph (g)(7).

(8) *Examples.* The following examples illustrate the principles of this paragraph (g). For purposes of these examples, it is assumed that the requirements of the all events test other than economic performance have been met and, except as otherwise provided, that the recurring item exception is not used.

*Example 1. Liabilities arising out of a tort.*

(i) During the period 1970 through 1975, Z corporation, a calendar year, accrual method taxpayer, manufactured and distributed industrial products that contained carcinogenic substances. In 1992, a number of lawsuits are filed against Z alleging damages due to exposure to these products. In settlement of a lawsuit maintained by A, Z agrees to purchase an annuity contract that will provide annual payments to A of \$50,000 for a period of 25 years. On December 15, 1992, Z pays W, an unrelated life insurance company, \$491,129 for such an annuity contract. Z retains ownership of the annuity contract.

(ii) Under paragraph (g)(2) of this section, economic performance with respect to Z's liability to A occurs as each payment is made to A. Consequently, \$50,000 is incurred by Z for each taxable year that a payment is made to A under the annuity contract. (Z must also include in income a portion of amounts paid under the annuity, pursuant to section 72.) The result is the same if in 1992 Z secures its obligation with a standby letter of credit.

(iii) If Z later transfers ownership of the annuity contract to A, an amount equal to the fair market value of the annuity on the date of transfer is incurred by Z in the taxable year of the transfer (see paragraph (g)(1)(ii)(B) of this section). In addition, the transfer constitutes a transaction to which section 1001 applies.

*Example 2. Rebates and refunds.* (i) X corporation, a calendar year, accrual method taxpayer, manufactures and sells hardware products. X enters into agreements that entitle each of its distributors to a rebate (or discount on future purchases) from X based on the amount of purchases made by the distributor from X during any calendar year. During the 1992 calendar year, X becomes liable to pay a \$2,000 rebate to distributor A. X pays A \$1,200 of the rebate on January 15, 1993, and the remaining \$800 on October 15, 1993. Assume the rebate is deductible (or allowable as an adjustment to gross receipts or cost of goods sold) when incurred.

(ii) If X does not adopt the recurring item exception described in § 1.461-5 with respect to rebates and refunds, then under paragraph (g)(3) of this section, economic performance with respect to the \$2,000 rebate liability occurs in 1993. However, if X has made a proper election under § 1.461-5, and as of December 31, 1992, all events have occurred that determine the fact of the rebate liability, X incurs \$1,200 for the 1992 taxable year. Because economic performance (payment) with respect to the remaining \$800 does not occur until October 15, 1993 (more than 8½ months after the end of 1992), X cannot use the recurring item exception for this portion of the liability (see § 1.461-5). Thus, the \$800 is not incurred by X until the 1993 taxable year. If, instead of making the cash payments to A during 1993, X adjusts the price of hardware purchased by A that is delivered to A during 1993, X's "payment" occurs as X would otherwise be required to recognize income resulting from a disposition at an unreduced price.

*Example 3. Awards, prizes, and jackpots.*

(i) W corporation, a calendar year, accrual



method taxpayer, produces and sells breakfast cereal. W conducts a contest pursuant to which the winner is entitled to \$10,000 per year for a period of 20 years. On December 1, 1992, A is declared the winner of the contest and is paid \$10,000 by W. In addition, on December 1 of each of the next nineteen years, W pays \$10,000 to A.

(ii) Under paragraph (g)(4) of this section, economic performance with respect to the \$200,000 contest liability occurs as each of the \$10,000 payments is made by W to A. Consequently, \$10,000 is incurred by W for the 1992 taxable year and for each of the succeeding nineteen taxable years.

**Example 4. Awards, prizes, and jackpots.** (i) Y corporation, a calendar year, accrual method taxpayer, owns a casino that contains progressive slot machines. A progressive slot machine provides a guaranteed jackpot amount that increases as money is gambled through the machine until the jackpot is won or until a maximum predetermined amount is reached. On July 1, 1993, the guaranteed jackpot amount on one of Y's slot machines reaches the maximum predetermined amount of \$50,000. On October 1, 1994, the \$50,000 jackpot is paid to B.

(ii) Under paragraph (g)(4) of this section, economic performance with respect to the \$50,000 jackpot liability occurs on the date the jackpot is paid to B. Consequently, \$50,000 is incurred by Y for the 1994 taxable year.

**Example 5. Insurance, warranty, and service contracts.** (i) V corporation, a calendar year, accrual method taxpayer, manufactures toys. V enters into a contract with W, an unrelated insurance company, on December 15, 1992. The contract obligates V to pay W a premium of \$500,000 before the end of 1995. The contract obligates W to satisfy any liability of V resulting from claims made during 1993 or 1994 against V by any third party for damages attributable to defects in toys manufactured by V. Pursuant to the contract, V pays W a premium of \$500,000 on October 1, 1995.

(ii) Assuming the arrangement constitutes insurance, under paragraph (g) (5) of this section economic performance occurs as the premium is paid. Thus, \$500,000 is incurred by V for the 1995 taxable year.

**Example 6. Insurance, warranty, and service contracts.** (i) Y corporation, a calendar year, accrual method taxpayer, is a common carrier. On December 15, 1992, Y enters into a contract with Z, an unrelated insurance company, under which Z must satisfy any liability of Y that arises during the succeeding 5 years for damages under a workers compensation act or out of any tort, provided the event that causes the damages occurs during 1993 or 1994. Under the contract, Y pays \$360,000 to Z on December 31, 1993.

(ii) Assuming the arrangement constitutes insurance, under paragraph (g)(5) of this section economic performance occurs as the premium is paid. Consequently, \$360,000 is incurred by Y for the 1993 taxable year. The period for which the \$360,000 amount is permitted to be taken into account is determined under the capitalization rules because the insurance contract is an asset

having a useful life extending substantially beyond the close of the taxable year.

**Example 7. Insurance, warranty, and service contracts.** Assume the same facts as in Example 6, except that Y is obligated to pay the first \$5,000 of any damages covered by the arrangement with Z. Y is, in effect, self-insured to the extent of this \$5,000 "deductible." Thus, under paragraph (g)(2) of this section, economic performance with respect to the \$5,000 liability does not occur until the amount is paid to the person to which the tort or workers compensation liability is owed.

**Example 8. Taxes.** (i) The laws of State A provide that every person owning personal property located in State A on the first day of January shall be liable for tax thereon and that a lien for the tax shall attach as of that date. In addition, the laws of State A provide that 60% of the tax is due on the first day of December following the lien date and the remaining 40% is due on the first day of July of the succeeding year. On January 1, 1992, X corporation, a calendar year, accrual method taxpayer, owns personal property located in State A. State A imposes a \$10,000 tax on S with respect to that property on January 1, 1992. X pays State A \$6,000 of the tax on December 1, 1992, and the remaining \$4,000 on July 1, 1993.

(ii) Under paragraph (g)(6) of this section, economic performance with respect to \$6,000 of the tax liability occurs on December 1, 1992. Consequently, \$6,000 is incurred by X for the 1992 taxable year. Economic performance with respect to the remaining \$4,000 of the tax liability occurs on July 1, 1993. If X has adopted the recurring item exception described in § 1.461-5 as a method of accounting for taxes, and as of December 31, 1992, all events have occurred that determine the liability of X for the remaining \$4,000, X also incurs \$4,000 for the 1992 taxable year. If X does not adopt the recurring item exception method, the \$4,000 is not incurred by X until the 1993 taxable year.

(h) **Liabilities arising under the Nuclear Waste Policy Act of 1982.** Notwithstanding the principles of paragraph (d) of this section, economic performance with respect to the liability of an owner or generator of nuclear waste to make payments to the Department of Energy ("DOE") pursuant to a contract required by the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425, 42 U.S.C. 10101-10226 (1982)) occurs as each payment under the contract is made to DOE and not when DOE satisfies its obligations under the contract. This rule applies to the continuing fee required by 42 U.S.C. 10222(a)(2) (1982), as well as the one-time fee required by 42 U.S.C. 10222(a)(3) (1982). For rules relating to when economic performance occurs with respect to interest, see paragraph (e) of this section.

(i) [Reserved]

(j) **Contingent liabilities.** [Reserved]

(k) **Special effective dates—(1) In general.** Except as otherwise provided in

this paragraph (k) and § 1.461-7T, section 461(h) and this section apply to liabilities that would, under the law in effect before the enactment of section 461(h), be allowable as a deduction or otherwise incurred after July 18, 1984. For example the economic performance requirement applies to all liabilities arising under a workers compensation act or out of any tort that would, under the law in effect before the enactment of section 461(h), be incurred after July 18, 1984. See, however, Q&A-2 of § 1.461-7T, which provides an election to make this change in method of accounting applicable to either the portion of the first taxable year that occurs after July 18, 1984 ("part-year change method"), or the entire first taxable year ending after July 18, 1984 ("full-year change method"). See also Q&A-12 of § 1.461-7T for special effective date rules for interest.

(2) **Long-term contracts.** Except as otherwise provided in paragraph (M)(2) of this section, in the case of liabilities described in paragraph (d)(2)(ii) of this section (relating to long-term contracts), paragraph (d)(2)(ii) of this section applies to liabilities that would, but for the enactment of section 461(h), be allowable as a deduction or otherwise incurred for taxable years beginning after December 31, 1991.

(3) **Payment liabilities.** Except as otherwise provided in paragraph (m)(2) of this section, in the case of liabilities described in paragraph (g) of this section (other than liabilities arising under a workers compensation act or out of any tort described in paragraph (g)(2) of this section), paragraph (g) of this section applies to liabilities that would, but for the enactment of section 461(h), be allowable as a deduction or otherwise incurred for taxable years beginning after December 31, 1991.

(l) [Reserved]

(m) **Change in method of accounting required by this section—(1) In general.** For the first taxable year ending after July 18, 1984, a taxpayer is granted the consent of the Commissioner to change its method of accounting for liabilities to comply with the provisions of this section pursuant to any of the following procedures:

(i) The part-year change in method election described in Q&A-2 through Q&A-6 and Q&A-8 through Q&A-10 of § 1.461-7T;

(ii) The full-year change in method election described in Q&A-2 through Q&A-6 and Q&A-8 through Q&A-10 of § 1.461-7T; or

(iii) If no election is made, the cut-off method described in Q&A-1 and Q&A-11 of § 1.461-7T.



(2) *Change in method of accounting for long-term contracts and payment liabilities*—(1) *First taxable year beginning after December 31, 1991.* For the first taxable year beginning after December 31, 1991, a taxpayer is granted the consent of the Commissioner to change its method of accounting for long-term contract liabilities described in paragraph (D)(2)(ii) of this section and payment liabilities described in paragraph (g) of this section (other than liabilities arising under a workers compensation act or out of any tort described in paragraph (g)(2) of this section) to comply with the provisions of this section. The change must be made in accordance with paragraph (m)(1)(ii) or (m)(1)(iii) of this section, except the effective date is the first day of the first taxable year beginning December 31, 1991.

(ii) *Retroactive change in method of accounting for long-term contracts and payment liabilities.* For the first taxable year beginning after December 31, 1989, or the first taxable year beginning after December 31, 1990, a taxpayer is granted the consent of the Commissioner to change its method of accounting for long-term contract liabilities described in paragraph (d)(2)(ii) of this section and payment liabilities described in paragraph (g) of this section (other than liabilities arising under a workers compensation act or out of any tort described in paragraph (g)(2) of this section) to comply with the provisions of this section. The change must be made in accordance with paragraph (m)(1)(ii) or (m)(1)(iii) of this section, except the effective date is the first day of the first taxable year beginning after December 31, 1989, or the first day of the first taxable year beginning after December 31, 1990. The taxpayer may make the change in method of accounting, including a full-year change in method election under paragraph (m)(1)(ii) of this section and Q&A-5 of § 1.461-7T, by filing an amended return for such year, provided the amended return is filed on or before October 7, 1992.

#### § 1.461-5 Recurring item exception.

(a) *In general.* Except as otherwise provided in paragraph (c) of this section, a taxpayer using an accrual method of accounting may adopt the recurring item exception described in paragraph (b) of this section as method of accounting for one or more types of recurring items incurred by the taxpayer. In the case of the "other payment liabilities" described in § 1.461-4(g)(7), the Commissioner may provide for the application of the recurring item exception by regulation, revenue procedure or revenue ruling.

(b) *Requirements for use of the exception*—(1) *General rule.* Under the recurring item exception, a liability is treated as incurred for a taxable year if—

(i) As of the end of that taxable year, all events have occurred that establish the fact of the liability and the amount of the liability can be determined with reasonable accuracy;

(ii) Economic performance with respect to the liability occurs on or before the earlier of—

(A) The date the taxpayer files a timely (including extensions) return for that taxable year; or

(B) The 15th day of the 9th calendar month after the close of that taxable year;

(iii) The liability is recurring in nature; and

(iv) Either—

(A) The amount of the liability is not material; or

(B) The accrual of the liability for that taxable year results in a better matching of the liability with the income to which it relates than would result from accruing the liability for the taxable year in which economic performance occurs.

(2) *Amended returns.* A taxpayer may file an amended return treating a liability as incurred under the recurring item exception for a taxable year if economic performance with respect to the liability occurs after the taxpayer files a return for that year, but within 8½ months after the close of that year.

(3) *Liabilities that are recurring in nature.* A liability is recurring if it can generally be expected to be incurred from one taxable year to the next. However, a taxpayer may treat such a liability as recurring in nature even if it is not incurred by the taxpayer in each taxable year. In addition, a liability that has never previously been incurred by a taxpayer may be treated as recurring if it is reasonable to expect that the liability will be incurred on a recurring basis in the future.

(4) *Materiality requirement.* For purposes of this paragraph (b):

(i) In determining whether a liability is material, consideration shall be given to the amount of the liability in absolute terms and in relation to the amount of other items of income and expense attributable to the same activity.

(ii) A liability is material if it is material for financial statement purposes under generally accepted accounting principles.

(iii) A liability that is immaterial for financial statement purposes under generally accepted accounting principles

may be material for purposes of this paragraph (b).

(5) *Matching requirement.* (i) In determining whether the matching requirement of paragraph (b)(1)(iv)(B) of this section is satisfied, generally accepted accounting principles are an important factor, but are not dispositive.

(ii) In the case of a liability described in paragraph (g)(3) (rebates and refunds), paragraph (g)(4) (awards, prizes, and jackpots), paragraph (g)(5) (insurance, warranty, and service contracts), paragraph (g)(6) (taxes), or paragraph (h) (continuing fees under the Nuclear Waste Policy Act of 1982) of § 1.461-4, the matching requirement of paragraph (b)(1)(iv)(B) of this section shall be deemed satisfied.

(c) *Types of liabilities not eligible for treatment under the recurring item exception.* The recurring item exception does not apply to any liability of a taxpayer described in paragraph (e) (interest), paragraph (g)(2) (workers compensation, tort, breach of contract, and violation of law), or paragraph (g)(7) (other liabilities) of § 1.461-4. Moreover, the recurring item exception does not apply to any liability incurred by a tax shelter, as defined in section 461(i) and § 1.448-1T(b).

(d) *Time and manner of adopting the recurring item exception*—(1) *In general.* The recurring item exception is a method of accounting that must be consistently applied with respect to a type of item, or for all items, from one taxable year to the next in order to clearly reflect income. A taxpayer is permitted to adopt the recurring item exception as part of its method of accounting for any type of item for the first taxable year in which that type of item is incurred. Except as otherwise provided, the rules of section 446(e) and § 1.446-1(e) apply to changes to or from the recurring item exception as a method of accounting. See Q&A-7 of § 1.461-7T for rules concerning the time and manner of adopting the recurring item exception for taxable years that include July 19, 1984. See Q&A-3(d) of § 1.461-7T for an explanation of the term "type of item".

(2) *Change to the recurring item exception method for the first taxable year beginning after December 31, 1991*—(i) *In general.* For the first taxable year beginning after December 31, 1991, a taxpayer is granted the consent of the Commissioner to change to the recurring item exception method of accounting. A taxpayer is also granted the consent of the Commissioner to expand or modify its use of the recurring item exception method for the first taxable year beginning after December 31, 1991. For



each trade or business for which a taxpayer elects to use the recurring item exception method, the taxpayer must use the same method of change (cut-off or full-year change) it is using for that trade or business under § 1.461-4(m). See Q&A-11 of § 1.461-7T for an explanation of how amounts are taken into account under the cut-off method (except that, for purposes of this paragraph (d)(2), the change applies to all amounts otherwise incurred on or after the first day of the first taxable year beginning after December 31, 1991). See Q&A-6 of § 1.461-7T for an explanation of how amounts are taken into account under the full-year change method (except that the change in method occurs on the first day of the first taxable year beginning after December 31, 1991). The full-year change in method may result in section 481(a) adjustment that must be taken into account in the manner described in Q&A-8 and Q&A-9 of § 1.461-7T (except that the taxable year of change is the first taxable year beginning after December 31, 1991).

(ii) *Manner of changing to the recurring item exception method.* For the first taxable year beginning after December 31, 1991, a taxpayer may change to the recurring item exception method by accounting for the item on its timely filed original return for such taxable year (including extensions). The automatic consent of the Commissioner is limited to those items accounted for under the recurring item exception method on the timely filed return, unless the taxpayer indicates a wider scope of change by filing the statement provided in Q&A-7 (b)(2) of § 1.461-7T.

(3) *Retroactive change to the recurring item exception method.* For the first taxable year beginning after December 31, 1989, or December 31, 1990, a taxpayer is granted consent of the Commissioner to change to the recurring item exception method of accounting, provided the taxpayer complies with paragraph (d)(2) of this section on either the original return for such year or on an amended return for such year filed on or before October 7, 1991. For this purpose the effective date is the first day of the first taxable year beginning after December 31, 1989, or the first day of the first taxable year beginning after December 31, 1990. A taxpayer is also granted the consent of the Commissioner to expand or modify its use of the recurring item exception method for the first taxable year beginning after December 31, 1989, December 31, 1990, or December 31, 1991.

(e) *Examples.* The following examples illustrate the principles of this section:

*Example 1. Requirements for use of the recurring item exception.* (i) Y corporation, a calendar year, accrual method taxpayer, manufactures and distributes video cassette recorders. Y timely files its federal income tax return for each taxable year on the extended due date for the return (September 15, of the following taxable year). Y offers to refund the price of a recorder to a purchaser not satisfied with the recorder. During 1992, 100 purchasers request a refund of the \$500 purchase price. Y refunds \$30,000 on or before September 15, 1993, and the remaining \$20,000 after such date but before the end of 1993.

(ii) Under paragraph (g)(3) of § 1.461-4, economic performance with respect to \$30,000 of the refund liability occurs on September 15, 1993. Assume the refund is deductible (or allowable as an adjustment to gross receipts or cost of goods sold) when incurred. If Y does not adopt the recurring item exception with respect to rebates and refunds, the \$30,000 refund is incurred by Y for the 1993 taxable year. However, if Y has properly adopted the recurring item exception method of accounting under this section, and as of December 31, 1992, all events have occurred that determine the fact of the liability for the \$30,000 refund, Y incurs that amount for the 1992 taxable year. Because economic performance (payment) with respect to the remaining \$20,000 occurs after September 15, 1993 (more than 8½ months after the end of 1992), that amount is not eligible for recurring item treatment under this section. Thus, the \$20,000 amount is not incurred by Y until the 1993 taxable year.

*Example 2. Requirements for use of the recurring item exception; amended returns.* The facts are the same as in Example 1, except that Y files its income tax return for 1992 on March 15, 1993, and Y does not refund the price of any recorder before that date. Under paragraph (b)(1) of this section, the refund liability is not eligible for the recurring item exception because economic performance with respect to the refund does not occur before Y files a return for the taxable year for which the item would have been incurred under the exception. However, since economic performance occurs within 8½ months after 1992, Y may file an amended return claiming the \$30,000 as incurred for its 1992 taxable year (see paragraph (b)(2) of this section).

**§ 1.461-6 Economic performance when certain liabilities are assigned or are extinguished by the establishment of a fund.**

(a) *Qualified assignments of certain personal injury liabilities under section 130.* In the case of a qualified assignment (within the meaning of section 130(c)), economic performance occurs as a taxpayer-assignor makes payments that are excludable from the income of the assignee under section 130(a).

(b) *Section 468B.* Economic performance occurs as a taxpayer

makes qualified payments to a designated settlement fund under section 468B, relating to special rules for designated settlement funds.

(c) *Payments to other funds or persons that constitute economic performance.* [Reserved]

(d) *Effective dates.* The rules in paragraph (a) of this section apply to payments after July 18, 1984.

David G. Blattner,

Acting Commissioner of Internal Revenue.

Dated: January 24, 1992.

Approved:

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

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**DEPARTMENT OF JUSTICE**

**28 CFR Part 79**

[Order No. 1580-92]

**Claims Under the Radiation Exposure Compensation Act**

**AGENCY:** Department of Justice

**ACTION:** Final rule.

**SUMMARY:** This Rule implements the Radiation Exposure Compensation Act of 1990 (Act). The Act authorizes the Attorney General of the United States to establish procedures for making certain payments to qualifying individuals who developed one of the diseases specified in the Act following: (1) A presumptive exposure to radiation related to the Federal Government's atmospheric nuclear weapons testing program, or (2) actual exposure to radiation from employment in a uranium mine.

Under the Act, an individual is presumed to have been exposed to radiation if the individual: (1) Was physically present for a specified length of time during designated periods in certain specified areas downwind of the Nevada Test Site; or (2) participated onsite in the atmospheric detonation of a nuclear device. Individuals actually exposed to radiation may qualify by demonstrating exposure to defined minimum levels of radiation during employment in an underground uranium mine between 1947 and 1971, in Colorado, Utah, Arizona, New Mexico, or Wyoming. These regulations describe the extent and type of proof necessary to prove eligibility, and set forth procedures for filing, determining, and paying claims for compensation. The amount of compensation set forth in the Act is limited to: (1) \$50,000 for persons who developed a specified disease after



physical presence downwind from the Nevada Test Site; (2) \$75,000 for persons who developed a specified disease after onsite participation; (3) \$100,000 for persons who developed a qualifying disease after employment underground in a uranium mine. In cases where the person who developed the disease is deceased, certain survivors may receive the compensation payment.

**DATES:** Effective date: May 11, 1992.

Persons may apply at any time after publication in the *Federal Register*. Payments may not be made until the effective date.

**FOR FURTHER INFORMATION CONTACT:**

Claim forms, guidebooks and copies of these regulations may be obtained by writing to: Radiation Exposure Compensation Program, U.S. Department of Justice, P.O. Box 146, Ben Franklin Station, Washington, DC 20044-0146, or calling 1-800-729-RECP. For additional information contact Frank F. Krider, Assistant Director, Torts Branch, Civil Division, P.O. Box 146, Benjamin Franklin Station, Washington, DC 20044-0146; Telephone number (202) 208-4910.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 9, 1991, the Attorney General published a notice of proposed rulemaking in the *Federal Register* (56 FR 45907-45926) which set forth proposed procedures for implementing the Radiation Exposure Compensation Act. Comments were received over a period of 45 days which ended on October 24, 1991. The Department of Justice received 126 letters, each containing one or more comments regarding the proposed regulations from interested citizens and organizations. The majority of comments the Department received were substantive and very useful to the Department. These comments have been summarized and grouped together according to their similarity in the section labelled Discussion of Changes and Comments, below.

Some changes were made in the proposed regulations based upon the comments. Other changes were made after a review by the Department. All significant changes are discussed below. Minor or technical changes or clarifications are not discussed.

These regulations were promulgated as proposed part 78. Because part 78 has been used for other regulations, these regulations are now designated as part 79.

**Discussion of Changes and Comments**

Many commentators requested that the Department modify sections of the regulations that could not be modified because they incorporated statutory requirements. These included:

(1) Specific requirements set forth in section 4 of the Act which were incorporated into the following sections: Proposed §§ 79.11 and 79.12 regarding the affected areas; Proposed §§ 79.12 and 79.22 regarding the time periods for physical presence; Proposed § 79.21 regarding the specified compensable diseases; Proposed § 79.22 regarding latency periods and lifestyle exceptions for cigarette smoking, alcohol consumption, and coffee consumption;

(2) Specific requirements set forth in section 5 of the Act which were incorporated into the following sections: Proposed § 79.31 regarding the uranium mining states, the eligible diseases related to mining, the time periods for employment in a mine, and the statutory requirement that silicosis and pneumoconiosis be compensable if the mine employment occurred on an Indian Reservation; Proposed § 79.32 regarding the number of working level months in connection with smoking and age, and listed criteria that required employment in a uranium mine rather than a mill, and only listed lung cancer and certain nonmalignant respiratory diseases as eligible diseases in conjunction with uranium mining;

(3) Specific requirements set forth in section 6 of the Act which were incorporated into the following sections: Proposed § 79.51 which identified persons eligible to file claims; Proposed § 79.55 regarding the setoffs.

Several commentators asked us to render opinions as to whether certain records would prove eligibility criteria in a hypothetical case or in individual cases. We cannot render opinions in advance about such matters prior to actually seeing the claim and the documents and issuing a Decision on the claim.

**Subpart A**

**Section 79.2—Definitions**

The definition of atmospheric nuclear test was deleted from this section because it is included in subpart E. The definition of fallout was deleted because it is not used in any manner which would require it to be defined. The definition of immediate family member was widened to include parents.

One commentator suggested that the definition of medical document was overly restrictive, and should be revised to allow for submission of any document and any medical opinion by an expert.

We have declined to accept this suggestion. We believe it is essential to rely on contemporaneous records created by health care providers for the purpose of providing medical treatment to the claimant because these records have inherent reliability. "Expert" opinions produced for litigation purposes, or for the purpose of obtaining a large lump sum claim payment, are inherently unreliable in a system which is non-adversarial and has no mechanism to test the credibility or accuracy of the opinion.

**Section 79.4—Burden of Proof, Production of Documents, Presumptions, and Affidavits**

A majority of the comments we received concerned the proposed limitation on the use of affidavits or declarations to establish eligibility criteria. Almost all of these comments related to subpart D, Uranium Miners. Some commentators suggested that we permit affidavits or declarations under certain circumstances to fill in gaps left by records which provided some, but not all of the information necessary to establish eligibility. Other commentators recommended that we accept affidavits to prove almost any criterion without any records to support the affidavit. The comments of one attorney in Durango, Colorado, were particularly helpful by providing specific examples of common records and some of the gaps in those records. After careful consideration, we have expanded the use of affidavits or declarations in two instances to fill in gaps in records. First, use of an affidavit will be permitted to prove the level of coffee consumption in a case involving pancreatic cancer. This change was necessary for the reasons expressed in the portion of this discussion relating to § 79.27 below.

Second, when social security, income tax or similar records indicate that the claimant was employed by a business that was engaged in uranium mining during the period of the claimant's employment, use of an affidavit or declaration will be permitted to identify:

- (1) The claimant's occupation or activity in the mine;
- (2) The identity of the mine;
- (3) The county and state in which the mine was located; and
- (4) The actual time period the claimant worked in the mine.

The use of affidavits under these circumstances will not increase the risk of fraud because social security records or income tax records will reflect employment for a business during some portion of a year. This information can be matched with Atomic Energy



Commission (AEC) records to verify that the business was involved in uranium mining during the year reflected on the social security or tax records.

This change will also significantly assist claimants by allowing them to fill in the gaps that exist when more detailed records do not exist. For most claimants, the social security records will be complete and accurate, and will reflect employment for a mining company when no other record reflects such employment. Some commentators have suggested that there were "fly-by-night" mining companies that failed to report earnings to the Social Security Administration as required by law. We have seen no evidence to support this suggestion. In fact, the social security records we have seen appear to be accurate and comprehensive. Nevertheless, in the very few cases where a claimant worked for a company that failed to report earnings, the claimant will be able to prove employment by offering federal or state income tax records which the claimant was required by law to file. In revising these regulations, we have presumed that claimants obeyed the law and filed income tax returns each year reflecting actual earnings from employment.

Some commentators suggested that the burden of proof was onerous or unreasonable. We have examined the burden imposed on the individual submitting the claim and believe that it is reasonable to require persons who file claims to submit documents and records to establish their eligibility by a preponderance of the evidence. Individuals who apply for these lump sum payments are best situated to supply the information, or the access to the information, that establishes their eligibility to receive these payments.

#### *Section 79.5—Requirements for Written Medical Documentation, Contemporaneous Records, and Other Records of Documents*

Some commentators opined that the portion of this provision requiring production of the original or a certified copy was harsh and unduly burdensome. The reason for this rule is to ensure that the documents upon which the Department will rely in paying claims of up to \$100,000 have not been altered or fabricated. The inconvenience to the claimant in slight since it will only require minimal effort to obtain such a certification from institutions which generally provide such a certification on a regular basis (schools, state offices, etc.). In situations where certification cannot be obtained, the claimant may submit the document without a certification, provided the

claimant attaches an unsworn statement explaining why such certification is not possible. The Department can verify the explanation if necessary. After balancing the benefit to be gained from generally requiring certification against the inconvenience of obtaining it, we conclude that the benefit clearly outweighs the inconvenience.

One commentator inquired regarding the standard to be used by the Radiation Exposure Compensation Unit in deciding not to accept a document because it appeared to be unreliable or untrustworthy. The standard is reasonableness. The rule is designed to exclude documents which are forged or altered or were created under circumstances that do not guarantee trustworthiness. The rule is purposely broad in order to cover a limitless range of possibilities. The rule will be applied with reason, and in all circumstances the person submitting the claim will be notified of the reasons that the document has not been accepted as proof of his claim.

#### **Subpart B**

##### *Section 79.11—Definitions*

One commentator expressed concern that the terms "first exposure of initial exposure" § 79.11(d) were defined as the date the claimant was first physically present in the affected area during the designated time period. The commentator felt that it would be unfair to use the first possible date of exposure, and argued that the definition should be changed to the last date of physical presence during the designated time period. This comment was considered but rejected because the Act presumes exposure to fallout each day during the designated time period. Thus, the first day the claimant was physically present in the affected area must be presumed to be the date he/she was first exposed to fallout. Moreover, it would be anomalous to count the first day of presence in the affected area for purposes of calculating the requisite one or two year presence requirement within the designated time period, and at the same time use the last day of presence to calculate the latency requirement.

Several commentators felt that the date of onset as defined in § 79.12(d) should be changed from the date of diagnosis to some other time. Some commentators believed that the date should be established by some of the best estimate of a physician other than the diagnosing physician. The commentators did not specify the criteria upon which such an estimate of the onset would be determined. Since "onset" is not defined in the Act, the

definition of "onset" was considered at length both before and after the proposed regulations were published. The Department consulted with officials at the NCI and epidemiologists to arrive at a definition. Several criteria for determining "onset" were considered, but rejected in favor of the date of diagnosis.

One reason for using the date of diagnosis is that the legislative history indicates that the date of diagnosis was considered to be the date of onset. A second reason is that the epidemiological data upon which the latency periods are based use the date of diagnosis as the date of onset. Third, officials at the NCI and other epidemiologists considered several alternatives but recommended the date of diagnosis as the date of onset. Finally, the date of diagnosis is the single date which is clear and can be uniformly applied to all claimants.

However, in the case of leukemia, the definition of "onset" was slightly modified to provide some flexibility in those situations where diagnosis of the claimant's leukemia took place on a date shortly after the expiration of the 30-year latency period. Thus, the date of "onset" for leukemia will be presumed to be the date of diagnosis unless otherwise established by appropriate authorities at the NCI using such written medical documentation as may be prescribed by the Unit for an individual case.

##### *Section 79.13—Proof of Physical Presence*

The list of documents that can be submitted to prove physical presence was expanded to include original postcards and envelopes from letters addressed to the claimant or an immediate family member during the designated time period which have a postmark and a cancelled stamp.

One commentator stated that there were insufficient records existing to prove a child was present in the eligible portions of Clark County, Nevada, during July 1962. While it may be difficult in some cases to demonstrate residency during the entire period from June 30 through July 31, 1962, almost all actual residents should be able to provide such proof. The number of existing records is quite large and includes federal tax records, school records, property records, telephone directory listings, and the like. A combination of such records could readily establish the required presence. In addition, the Department has included a new category of records in this final draft of this section—



postmarked letters—to assist claimants and their eligible surviving beneficiaries in establishing proof of residency.

#### Section 79.16—Proof of Medical Condition

Two changes were made to this section in response to comments. First, the requirement that the claimant submit the medical documents in the order appearing on the list was eliminated. The elimination of this requirement will significantly ease the burden on the claimant without diminishing our ability to verify existence of a qualifying disease. Each of the medical documents is a reliable means by which to diagnose or prove existence of the disease, and no harm will result by allowing the claimant to submit the document he can most easily obtain.

Second, the requirement that the death certificate be signed by the treating physician at the time of death was modified to allow signature by any physician at the time of death. This change was made in recognition of the fact that any physician, whether treating or non-treating, is presumed to have sufficient skill and expertise to reliably determine the cause of death. The change also eliminates the need for the claimant to provide documentation to show that the physician who signed the death certificate was, in fact, the treating physician.

The Department specifically declined to adopt the suggestion made by some commentators that all death certificates be accepted regardless of the training of the person who signed the certificate. While such death certificates are sufficiently reliable to prove a person has died, they are not a reliable means to prove the cause of death or the existence of one of the diseases listed in the Act because a person with no expertise in medicine is simply not qualified to render such an opinion.

We declined to adopt some comments which requested that we modify our language which requires that the claimant submit medical documentation that contains sufficient information from which physicians at the NCI can make a diagnosis of the disease of a reasonable degree of medical certainty. We believe this is an appropriate expression of the level of confidence routinely applied by physicians rendering diagnoses and treatment for the illnesses listed in the Act.

#### Subpart C

#### Section 79.26—Proof of Medical Condition

The same changes as noted above in § 79.16.

#### Section 79.27—Proof of No Heavy Smoking, No Heavy Drinking, No Heavy Coffee Consumption, and No Indication of Disease

This is a new section that had been partially included in § 79.26 of the proposed regulations. This section clarifies the method we will use to determine whether a claimant may be barred from receiving compensation because he drank or smoked heavily, or suffered from hepatitis or cirrhosis of the liver. In all cases except coffee consumption, we will require production of selected medical records created around the date of diagnosis which would almost certainly contain information about these habits or diseases. If the records disclose one of these habits or an indication of either hepatitis or cirrhosis, the claimant will be allowed to submit additional records to rebut the statement in the records. If there is nothing in the records concerning these habits or the hepatitis or cirrhosis, we can safely presume that the claimant did not engage in these habits or have hepatitis or cirrhosis because these habits and diseases are matters which the treating or diagnosing physician would note in evaluating any one of the diseases for which the claimant can recover under the Act.

In the case of coffee consumption, the link between coffee consumption and pancreatic cancer has not been well established in the medical literature. In accordance with our statutory mandate to determine, in consultation with the Surgeon General, what constitutes written medical documentation that an individual contracted a specified disease, section 6(b)(2)(A) of the Act, we have concluded that it is highly unlikely that a physician would have inquired about such a habit or noted it in any records. Therefore, we have provided that the claimant or eligible surviving beneficiary may submit a statement under oath to meet this requirement.

#### Subpart D

#### Section 79.31—Definitions

After reviewing several comments, the definition of employment in a uranium mine was modified so that the language would not unintentionally limit the types of qualifying activities to those only involved in the extraction of ore. This modification was made in recognition of the fact that other individuals were conducting activities underground in the mine in a collateral role to the actual extraction of ore. These individuals include inspectors, engineers, geologists, etc., as well as employees of the AEC and other non-mining company personnel. The definition also includes a

nonexclusive list of underground activities.

The definition of uranium mine was modified when it was apparent that there was confusion about the phrase in the previous definition defining a mine as an excavation beneath the surface of the ground. As modified, the definition makes it clear that the mine must be underground and cannot be an open pit, rim, or strip mine.

The definition of smoker was changed because we were correctly advised by the experts with whom we consulted that a smoker is defined in most epidemiological studies to be a person who smoked 1 cigarette per day for 1 year or less than 20 packs of cigarettes. Our previous definition was much higher than the normal epidemiological standard. The Public Health Service (PHS) study, which will be used by many miners as the basis for their eligibility for compensation under the Act, recorded smoking histories of individuals by the number of packs per day the person acknowledged smoking during his life. Since the standard of one cigarette per day for one year is so low, we believe it is prudent to define a smoker at a level slightly higher than the epidemiological standard to accommodate for any errors made in recording the smoking history of the miner. Thus, we have defined smoker to mean an individual who smoked one "pack year" of cigarette products. A pack year is one pack per day for one year, or 365 packs of cigarettes.

The definition of smoker also eliminates the distinction between smoking habits before exposure in the mines, during exposure in the mines, and after exposure in the mines. Authorities at the NCI have advised that there is simply no consensus in the medical community as to the exact relationship between smoking concurrently with mining, as opposed to smoking before or after mining.

The definition of lung cancer was modified on the advice of the NCI to specify inclusion of cancer of the lung, trachea, and bronchus, and to exclude cancer *in situ*.

We received comments requesting that we recognize a smoking latency period which would recognize the notion that the human body fully recovers from smoking after cessation for a long period of time. This recommendation was rejected after consultation with the NCI because the medical literature does not support this notion.



*Section 79.33—Proof of Employment in a Uranium Mine*

After reviewing comments, this section was rewritten to make it clearer and more specific and to outline the manner in which employment can be proven when nothing more than social security or tax records exists. The single most important change was the modification to permit affidavits or declarations to supply necessary information not specified in social security or tax records. This will allow individuals to demonstrate employment in a mine if they are not included in the PHS study, or the PHS study data concerning the individual is not complete.

*Section 79.34—Proof of Exposure to Working Level Months*

This section was rewritten to correspond to the revised § 79.33.

Many commentators expressed concern that working level measurements of radiation taken in the mines were too low because the measurements were either inaccurate or falsified, and some commentators urged adoption of some method to compensate for the perceived inaccuracies. The Department has declined, however, to adopt any method to inflate the working level measurements. Congress was aware that there were variations in the measurement of working levels in the mines but chose to set defined minimum levels based on the measurement data that existed. We must presume that these minimum levels set by Congress take into account the problems associated with the collection of the data. Moreover, there is simply no method of calculation which would result in 100% accuracy. Working level measurements varied widely within each mine in terms of time and location.

Another commentator requested that in calculating working levels for mines between 1947 and 1961, when little sampling was done by the PHS, we should use a methodology which results in estimates of working levels at a "high" level. We rejected this somewhat vague comment and, instead, have adopted the accepted methodology used by the PHS and NIOSH for estimating working levels outlined in § 79.34(g).

*Section 79.35—Proof of Lung Cancer*

This section was rewritten to make it clearer and to make technical corrections to the medical records we would accept. The changes made in § 79.16 were also made in this section.

One commentator suggested that we make some provision for situations where the Indian Health Service (IHS)

has lost or mislaid records. We carefully considered this proposal and found that no additional provision is necessary. Our investigation revealed that the IHS records are well kept and maintained. In the very few instances when a record is lost or mislaid, the IHS will be asked to perform the medical test which is the basis for the record listed in this section of the regulations. If the uranium miner is deceased, the person filing the claim may submit the death certificate as proof of lung cancer.

Some commentators suggested that in cases where the existence of the disease cannot be readily ascertained from the records provided by the claimant, we should allow the person submitting the claim to furnish the medical opinion of "an expert." We rejected this recommendation because the Act specifically provides that the disease be established by "written medical documentation." The express language of the Act and the legislative history suggests that this phrase refers to contemporaneous medical records created for the purpose of diagnosis and treatment, rather than testimony in written form prepared for the purpose of supporting a claim for compensation. Contemporaneous medical records generally will be more objective than those prepared specifically to support a claim for compensation. In those cases where the Department needs expert medical advice in making a determination about the existence of a disease, Congress directed that the Department should consult with the Surgeon General (National Cancer Institute).

*Section 79.36—Proof of Nonmalignant Respiratory Disease*

A major change was made in this section when commentators advised that diagnosis of pulmonary fibrosis based upon an x-ray alone was improper because it did not include a requirement that the claimant establish impairment in the functioning of his/her lungs, as even the definition of pulmonary fibrosis contained in the regulations correctly required. To correct this problem, experts recommended adoption of the types of tests currently used in the Black Lung program. The tests are pulmonary function tests and arterial blood-gas tests. Use of oximetry testing to measure oxygen saturation of the blood was considered but rejected because established standards are not available. The other tests are widely accepted and have established standards.

*Section 79.37—Proof of Smoking, Nonsmoking, and Age*

This section is new and is similar to § 79.27.

*Subpart E*

Substantial changes were made to the entire onsite participant section of the regulations based upon comments received from the Defense Nuclear Agency and the Department of Energy, and consultations between these agencies and the Department.

*Section 79.41—Definitions*

The definition of "onsite" was changed to eliminate any vagueness or ambiguity regarding the areas that are included in the definition. Two areas were added that had not previously been included:

(1) The South Atlantic Test Site used for a series of high altitude explosions; and

(2) Designated areas used for the purpose of monitoring fallout from the Nevada Test Site.

The definition of "participant" was changed to eliminate ambiguity regarding who should be included in the definition. The definition specifically identifies the classifications of eligible individuals (servicemen, PHS, Civil Defense, etc.) and specifically identifies the type of qualifying duties or place where such duties had to have been performed for the person to be considered a participant. The one significant addition is the addition of members of the PHS who performed duties as roving monitors of fallout, who had previously not been included.

The definition of "Atmospheric Detonation of a Nuclear Device" and the definition of "Period of Atmospheric Nuclear Testing" were modified, and the Appendix listing nuclear tests was eliminated to resolve the confusion that arose because of the inconsistencies between the definitions and the Appendix. Now, all atmospheric tests are listed in one definition together with the qualifying time periods associated with each test series.

One commentator requested that we be more specific in defining the term "Pacific Proving Grounds." This comment had substantial merit, and together with other comments indicating that this section was vague, we revised the definitions so that they are specific and unambiguous.

One commentator requested that we modify the definition of "onsite" to include the Atomic Energy Commission Laboratory at UCLA in Westwood, California, which is currently not included. The commentator noted that



the Laboratory analyzed samples of soil and other objects obtained from the test sites after detonation of a nuclear weapon. We declined to adopt this recommendation because the Act specifically requires "onsite participation" in a test. We believe Congress intended that the "participation" be directly related to the actual test of the nuclear device and that the term "onsite" be limited to locations at or near the test sites or places where decontamination of equipment used in the test occurred.

Several commentators urged us to include within the definition of "onsite" the cities of Hiroshima and Nagasaki. The Act, however, only provides for situations involving the "test" of a nuclear device. The devices detonated at Hiroshima and Nagasaki were not detonated for test purposes. This interpretation is consistent with Public Law 100-321, which differentiates between tests and combat uses of nuclear weapons.

One commentator urged us to include servicemembers involved in monitoring tests of nuclear weapons by foreign countries. We have rejected this recommendation because the legislative history suggests that Congress only intended for the Act to compensate persons harmed by atmospheric tests conducted by the United States.

Several commentators urged us to include certain tests in the definition of an atmospheric detonation of a nuclear device. One person suggested the Bainberry Test in 1970. This suggestion was rejected because the test occurred below ground and seven years after the Limited Test Ban Treaty halting atmospheric nuclear tests. Other suggestions included underground tests where venting into the atmosphere occurred, or where missile launches were aborted and the missile was destroyed on the launch pad or in the air. These events, however, do not reasonably fall within the plain meaning of the language used in the Act or intended by Congress. Congress intended to compensate persons affected by tests involving explosions of nuclear weapons which occurred at or above the surface of the ground or underwater.

#### *Section 79.43—Proof of Participation Onsite*

Subsection (c) was eliminated because the substance of this subsection was incorporated into the definition of "participant."

#### **Subpart F**

##### *Section 79.50—Attorney General's Delegation of Authority*

Some commentators objected to the Attorney General's delegation of authority to the Torts Branch to administer the Radiation Program. The commentators recommended using an "independent" board. This recommendation was rejected for two reasons. First, the legislative history reveals that Congress considered, but rejected a system in which a "board" was established as the decision-making body in favor of assigning the decision-making function to the discretion of the Attorney General. Second, the Torts Branch is best suited to handle this claims process given the expertise of the personnel within the specialized tort section. The personnel assigned to administer the process will perform their duties in an objective and non-adversarial manner.

##### *Section 79.51—Filing of Claims*

This section was changed in three significant ways. First, a provision was added to allow the Unit to return unfilled to the sender claims that substantially failed to comply with the regulations. Second, in response to comments we received, we added a provision which allows legal guardians of minor or incompetent claimants or eligible surviving beneficiaries to file claims on behalf of the claimant or eligible surviving beneficiary. Third, we substantially revised the subsections relating to the records that eligible surviving beneficiaries must submit to establish their relationship to the claimant. These subsections are now organized in a checklist format, and we believe they are clearer than the subsections in the proposed regulations. Additionally, each subsection now contains a provision that will allow the claimant to use a standard part of the claim form in lieu of an affidavit to provide certain information under oath.

One commentator asked how a common law marriage could be established. The section that now addresses this question is § 79.51(e), which provides that such a marriage may be established by furnishing a judicial or other governmental determination that a valid marriage existed.

One commentator asked us to consider that Navajo records establishing kinship were not accurate or complete. Our discussions with the Tribal records custodian indicate that the records are highly accurate, and in those instances where they are not complete, a person may take steps

through the records custodian or tribal courts to make them accurate and complete.

One commentator recommended that the limitation on filing claims more than three times be abolished since some claims may be more difficult to prove with a living claimant, as opposed to a deceased claimant. We rejected the recommendation because we believe the three-time limitation encourages claimants to submit well documented claims and discourages them from repeatedly refile a claim that has been denied with little or no change in the documentation supporting their claim. At the same time, the three-time rule is flexible enough to provide for a situation in which the claimant or eligible surviving beneficiary acquires new documentation or develops a compensable disease.

##### *Section 79.52—Review and Resolution of Claims*

A new part was added to this section to allow for an initial review and disposition of the claim, prior to medical review, if the claimant is obviously not eligible for compensation. This would be the case where a person submitted a claim for compensation for a disease that is not listed in the Act, or the person submitting the claim is not listed as an eligible surviving beneficiary under the Act, or some other similar reason that the claimant is barred from receiving compensation by the Act.

The time periods for curing defects or submitting additional documentation in support of the claim have all been increased to sixty days from the previous thirty days after an avalanche of comments from the public requesting that we increase the time period. If the claimant or eligible surviving beneficiary needs more than sixty days, he/she may request additional time from the Assistant Director within the Torts Branch, Civil Division, assigned to manage the Radiation Exposure Compensation Program.

New provisions were added to permit the Unit to require the claimant to provide an authorization to release records to verify eligibility in cases where independent confirmation is appropriate. Similarly, provisions were added to allow the Unit to obtain a release from the claimant to get records when it would be easier for the Unit to get the records than for the claimant to attempt to obtain the records.

Some commentators requested that we include provisions for hearings at which testimony could be received and evaluated by a fact finder who could judge the credibility of the person



testifying. These suggestions related to proof of employment in a uranium mine when no records existed which reflected such employment. We believe such a procedure is unnecessary, unreliable, and contrary to Congressional intent. The provisions of revised §§ 79.33 and 79.34 eliminate any reasonable need for an oral hearing. Furthermore, the claims procedure would become wholly unreliable if we permitted an individual to establish employment by testimony without, at a minimum, social security or income tax documentation supporting employment.

Moreover, our reading of the legislative history indicates that Congress specifically intended that the procedures for determining these claims would be entirely administrative and non-adversarial, and would not involve any oral hearing. In fact, early drafts of the Act provided for a system similar to that used in the National Vaccine Injury Compensation Program, where the claimant is provided an oral hearing in the Claims Court. That model was rejected in favor of an administrative system similar to those created to compensate the victims of the disaster at Texas City and the Japanese Americans interned during World War II.

Nowhere in the legislative history is there any indication that Congress intended for the Department to conduct oral hearings to determine eligibility. Indeed, the experience of the Department with the Vaccine Program demonstrates that a procedure that provides for an oral hearing would be a costly and time consuming endeavor that could not feasibly resolve the estimated number of cases all within the statutory timeframe of a year. Similarly, the experience of the Vaccine Program demonstrates that few attorneys could participate in cases involving discovery, one or more oral hearings, written briefs, appeals, expert witnesses, travel expenses and the like for less than \$10,000.

One commentator suggested that the Department assist in appropriate cases in obtaining records establishing eligibility. This comment has substantial merit and a provision was added to this section permitting the Department to obtain, in appropriate cases, an Authorization to Release Records to verify eligibility.

One comment was received inquiring whether a person would be informed of the documentation being used to determine his claim. In all cases the Unit will share this documentation with the claimant or eligible surviving beneficiary. For claims under subparts B, C, and D, the person submitting the

claim will, in many instances, provide the documents used to verify his claim. For claims under subpart E, verification will, in most instances, be provided by the Defense Nuclear Agency (DNA) or Department of Energy (DOE). In any case where the documentation is insufficient to verify eligibility, the person submitting the claim will be notified and provided the opportunity to submit additional documents to establish his claim in accordance with § 79.52.

#### *Section 79.53—Appeal Procedures*

The appeal period was increased to sixty days from thirty in response to numerous comments. Failure to submit the appeal within the sixty-day period no longer results in an automatic denial. Discretion is left to the Assistant Attorney General or to an Appeals Officer to deny the appeal on grounds that it was not submitted in a timely manner. A sentence was added clarifying that the Memorandum on the Appeal by the Assistant Attorney General or the Appeals Officer is the final agency action on the claim.

Several commentators asked that the provision prohibiting the claimant from offering the Appeals Officer new documentation not provided to the Assistant Director prior to his Decision be modified to allow such documentation to be provided. This request was considered but rejected as duplicative of the procedures established in § 79.52. In that section, a review will be conducted by the Assistant Director of the documentation submitted in support of the claim. If the documentation is insufficient, the person submitting the claim is notified and given sixty days or a greater period, if appropriate, within which to obtain additional records to establish eligibility. Individuals are expected to provide all documentation that exists to support his/her claim during that sixty-day period (or longer period if appropriate), and not withhold any documentation. If the documentation remains insufficient, the claim will be denied. At that point, it is expected that there will be no additional documentation to provide to the Appeals Officer. The Appeals Officer can then examine the same documentation used by the Assistant Director in arriving at his Decision, and determine whether his Decision is correct. The purpose of appellate review is to correct any errors in the application of the Act or the regulations to the evidence. This would be impossible if the evidence changed at each stage of review. In the unlikely instance that additional documentation is later

obtained by the individual submitting the claim, he/she can file a new claim.

One commentator inquired whether an oral hearing with the Appeals Officer would be allowed. It would not. The function of the Appeals Officer is to review the Assistant Director's Decision and determine whether that Decision is correct. The claimant or eligible surviving beneficiary can set forth in writing the reasons he/she believes the Decision is incorrect. The Appeals Officer will then evaluate the appeal and issue a Memorandum that will affirm or reverse the Decision, or remand the Decision for further action.

#### *Section 79.54—Attorneys*

This section was amended by deleting reference to the Agency Practice Act. The change was made to clarify that persons can only be represented by attorneys who file a written statement with the Assistant Director indicating that the attorney is a member in good standing of the highest court of the state and is authorized to represent the particular person on whose behalf he/she acts.

One commentator urged the Department to modify this section to permit a personal representative who is not an attorney to represent claimants. This suggestion could not be accepted because the Act and its legislative history indicate that Congress intended that a person filing a claim who desired representation should be represented by an attorney. This determination is reasonable because it objectively ensures a minimum level of skill and ethics of persons providing representation.

#### *Section 79.55—Procedures for Payment of Claims*

Significant changes were made in this section. A sentence was included permitting payment to be made to the legal guardian of any claimant or eligible surviving beneficiary. Subsection (b) was modified to give the Assistant Director broad power to ensure that the correct amount of any offset is made to the amount awarded under the Act and to verify the identity of the recipient of money paid under the Act.

Subsection (c) was clarified by specifying that payments under subparts B, C, and D would be offset by subtracting the amount of prior payments made pursuant to an award or settlement of any civil action based on the disease which is the subject of the claim under the Act. The amount of the civil action settlement or award is not inflated to present value prior to being



subtracted from the award payment under the Act.

Subsection (d) was clarified by specifying that payments under subpart E would be offset by subtracting the actuarial present value of: (1) The amount of prior payments made pursuant to an award or settlement of any civil action based on the disease which is the subject of the claim under the Act and (2) the sum of payments by the Federal Government. The Act requires that these amounts must be inflated to actuarial present value before they are subtracted from the compensation payment under subpart E. To assist the claimant, we have listed some of the usual types of payments persons receive from the Federal Government which would be subject to the offset, and others which would not. Subsection (d) also specifies the method for calculation of actuarial present value, and a worksheet has been attached as an appendix.

The term "actuarial present value" as used in the Act and the regulations actually refers to the "present value" of the payments identified above. This anomaly is the result of the use of the term "actuarial present value" in the Act in a manner that is inconsistent with its standard economic meaning and its use in eight other statutes. The concept of actuarial present value in its standard economic meaning and as used in the eight other statutes involves discounting of an uncertain stream of future payments, not known past payments. Thus, the term "actuarial present value" cannot be applied to known past payments. After reviewing the legislative history (which explained that the offset was intended to be a calculation of "present value") we have concluded that Congress actually intended that we subtract the present value of the past payments.

Subsection (e) lengthens the period in which to return the Acceptance of Payment Form from thirty to sixty days and changes the provision which indicates that failure to return the Form within the required time period constitutes an automatic rejection of the payment. A new provision has also been included which provides that rejected payments or shares of payments must be returned to the Trust Fund and not redistributed to other eligible surviving beneficiaries.

Subsection (g) is new and outlines the circumstances under which a person may receive more than one payment from the Trust Fund.

One commentator inquired whether the share of an award a child might be entitled to under the Act would be redistributed to other living children if

that child declined to receive his/her share. This comment was carefully considered but rejected because section 6 of the Act provides that a child is only entitled to a payment equal to the amount of the award divided by the number of living children. Any payment which included the redistributed share of a living child would violate the express terms of the Act.

#### Economic Assessment and Certification

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant adverse impact on a substantial number of small entities. It is not a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting assessment in accordance with section 6 of E.O. 12612. The information collections authorized by this rule have been cleared by the Office of Management and Budget under the Paperwork Reduction Act. (OMB Control No. 1105-0052)

#### List of Subjects in 28 CFR Part 79

Administrative practice and procedure, Cancer, Delegation of authority (Government agencies), Leukemia, Radiation Exposure Compensation Act, Tort claims, Underground mining, Uranium.

Pursuant to the provisions of the Radiation Exposure Compensation Act, 42 U.S.C.A. 2210 note (1991), (Pub. L. 101-426, 104 Stat. 920 (1990), as amended by Pub. L. 101-510, 104 Stat. 1835 (1990)), the Attorney General of the United States amends title 28 of the Code of Federal Regulations, chapter I, to add a new part 79 as follows:

### PART 79—CLAIMS UNDER THE RADIATION EXPOSURE COMPENSATION ACT

#### Subpart A—General

- 79.1 Purpose.
- 79.2 General definitions.
- 79.3 Compensable claim categories under the Act.
- 79.4 Burden of proof, production of documents, presumptions, and affidavits.
- 79.5 Requirements for written medical documentation, contemporaneous records, and other records or documents.

#### Subpart B—Eligibility Criteria for Claims Relating to Childhood Leukemia

- 79.10 Scope of subpart.
- 79.11 Definitions.
- 79.12 Criteria for eligibility.
- 79.13 Proof of physical presence.
- 79.14 Proof of initial exposure prior to age 21.
- 79.15 Proof of onset of leukemia between two and thirty years after first exposure.
- 79.16 Proof of medical condition

#### Subpart C—Eligibility Criteria for Claims Relating to Certain Specified Diseases

- 79.20 Scope of subpart.
- 79.21 Definitions.
- 79.22 Criteria for eligibility.
- 79.23 Proof of physical presence.
- 79.24 Proof of initial or first exposure after age 20 for claims under § 79.22(b)(1), or before age 20 for claims under § 79.22(b)(4), or before age 40 for claims under § 79.22(b)(5), or before age 30 for claims under § 79.22(b)(7).
- 79.25 Proof of onset of leukemia between two and thirty years after first exposure, and proof of onset of a specified compensable disease more than five years after first exposure.
- 79.26 Proof of medical condition.
- 79.27 Proof of no heavy smoking, no heavy drinking, no heavy coffee drinking, and no indication of disease.

#### Subpart D—Uranium Miners

- 79.30 Scope of subpart.
- 79.31 Definitions.
- 79.32 Criteria for eligibility.
- 79.33 Proof of employment in a uranium mine.
- 79.34 Proof of working level month exposure to radiation.
- 79.35 Proof of lung cancer.
- 79.36 Proof of non-malignant respiratory disease.
- 79.37 Proof of smoking, nonsmoking, and age.

#### Subpart E—Eligibility Criteria for Claims by Onsite Participants

- 79.40 Scope of subpart.
- 79.41 Definitions.
- 79.42 Eligibility criteria.
- 79.43 Proof of participation onsite during a period of atmospheric nuclear testing.
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Authority: Sec. 6 (b) and (j), Pub. L. 101-426, 104 Stat. 920 (42 U.S.C. 2210 note).

## Subpart A—General

### § 79.1 Purpose.

The purpose of these regulations is to implement section 6 of the Radiation Exposure Compensation Act of 1990, 42 U.S.C. 2210 note, which authorizes the Attorney General of the United States to establish procedures for making certain payments to qualifying individuals who contracted one of the diseases listed in the Act. The amount of each payment and a general statement of the qualifications are indicated in § 79.3(a). The procedures established in these regulations are designed to utilize existing records so that claims can be resolved in a reliable, objective, and nonadversarial manner, quickly and with little administrative cost to the United States or to the person filing the claim.

### § 79.2 General definitions.

(a) *Act* means the Radiation Exposure Compensation Act of 1990, Pub. L. 101-426, 104 Stat. 920, as amended by Pub. L. 101-510, section 3139, 104 Stat. 1835 (42 U.S.C. 2210 note).

(b) *Child* means a recognized natural child of the claimant, a step-child who lived with the claimant in a regular parent-child relationship, and an adopted child of the claimant.

(c) *Claim* means a petition for compensation under the Act filed with the Radiation Exposure Compensation Unit by a claimant or by his/her eligible surviving beneficiaries.

(d) *Claimant* means the individual, living or deceased, who is alleged to satisfy the criteria for compensation in either section 4 or section 5 of the Act.

(e) *Contemporaneous Record* means any document created at or around the time of the event that is recorded in the document.

(f) *Eligible surviving beneficiary* means a spouse, child, parent, grandchild or grandparent who is entitled under section 6(c)(4) (A) or (B) of the Act to file a claim and/or receive a payment on behalf of a deceased claimant.

(g) *Grandchild* means a child of a child of the claimant.

(h) *Grandparent* means a parent of a parent of the claimant.

(i) *Immediate family member* of a person means a spouse or child if the person is an adult, but if the person is a minor, immediate family member means either parent.

(j) *Medical document, documentation, or record* means any contemporaneous record of any physician, hospital, clinic

or other certified or licensed health care provider, or any other records routinely and reasonably relied on by physicians in making a diagnosis.

(k) *Radiation Exposure Compensation Unit* or *Unit* means the component of the Constitutional and Specialized Tort Litigation Section of the Torts Branch of the Civil Division of the United States Department of Justice designated by the Attorney General to execute the powers, duties and responsibilities assigned to the Attorney General pursuant to sections 4(a)(1)(C), 4(a)(2)(C)(ii), section 5(a)(2)(B)(ii), section 6, and any other pertinent provisions of the Act.

(l) *Parent* means the natural or adoptive father or mother of the claimant.

(m) *Spouse* means a wife or husband who was married to the claimant for a period of at least one (1) year immediately before the death of the claimant.

(n) *Trust Fund or Fund* means the Radiation Exposure Compensation Trust Fund in the Department of the Treasury, administered by the Secretary of the Treasury pursuant to section 3 of the Act.

### § 79.3 Compensable claim categories under the Act.

(a) In order to receive a compensation payment, each claimant or eligible surviving beneficiary must establish that the claimant meets each and every criterion of eligibility for at least one of the following compensable categories designated in the Act:

(1) Claims of childhood leukemia by persons presumably exposed to fallout from the atmospheric detonation of nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period. The amount of compensation is \$50,000. The regulations governing these claims are set forth in subpart B of this part.

(2) Claims relating to certain specified diseases by persons presumably exposed to fallout from the atmospheric detonation of nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period. The amount of compensation is \$50,000. The regulations governing these claims are set forth in subpart C of this part.

(3) Claims relating to lung cancer or certain nonmalignant respiratory diseases by persons employed in uranium mines in Arizona, Colorado, New Mexico, Utah or Wyoming during a designated time period, and who were exposed to specified minimum levels of radiation during the course of their employment. The amount of

compensation is \$100,000. The regulations governing these claims are set forth in subpart D of this part.

(4) Claims relating to certain specified diseases by persons who were onsite participants in the atmospheric detonation of a nuclear device. The amount of compensation is \$75,000. The regulations governing these claims are set forth in subpart E of this part.

(b) Any claim that does not meet all the criteria for at least one of these categories, as set forth in these regulations, must be denied.

(c) All claims for compensation under the Act must comply with the claims procedures and requirements set forth in subpart F of this part before any payment can be made from the Fund.

### § 79.4 Burden of proof, production of documents, presumptions, and affidavits.

(a) Except where otherwise noted, the claimant or eligible surviving beneficiary bears the burden of proving by a preponderance of the evidence the existence of each and every criterion necessary to establish eligibility under any compensable claim category set forth in § 79.3(a). Proof by a preponderance of the evidence means that it is more likely than not that the proposition to be proved is true. Subject to the exceptions expressly provided in the regulations, the claimant or eligible surviving beneficiary also bears the burden of providing to the Radiation Exposure Compensation Unit all written medical documentation, contemporaneous records, or other records and documents necessary to establish any and all criteria for compensation set forth in these regulations.

(b) A claimant or eligible surviving beneficiary will not be entitled to any presumption otherwise provided for in these regulations where reliable, material evidence exists which tends to disprove the existence of the fact that is the subject of the presumption. When such evidence exists, the claimant or eligible surviving beneficiary shall be notified and afforded the opportunity to submit additional written medical documentation or records in accordance with § 79.52 (b) or (c).

(c) Subject to the exceptions below, no written affidavits or declarations, by the claimant, eligible surviving beneficiary, or any other person, will be accepted as proof of any criterion for eligibility or relied on in determining whether a claim meets the requirements of the Act for compensation. Written affidavits or declarations, subject to penalty for perjury, will be accepted only to prove:



(1) Eligibility of family members under § 79.51 (e), (f), (g), (h) or (i);

(2) Other compensation received under § 79.55 (c) or (d);

(3) The amount of coffee consumed as set forth under § 79.27(c); or

(4) Mining information under § 79.33(b)(2).

**§ 79.5 Requirements for written medical documentation, contemporaneous records, and other records or documents.**

(a) All written medical documentation, contemporaneous records, and other records or documents submitted by claimant or eligible surviving beneficiary to prove any criteria provided for in these regulations must be originals, or certified copies of the originals, unless it is impossible to obtain an original or certified copy of the original. If it is impossible for a claimant to provide an original or certified copy of an original, the claimant or eligible surviving beneficiary must provide a written unsworn statement with the uncertified copy setting forth the reason why it is impossible.

(b) All documents submitted by a claimant or his/her eligible surviving beneficiary must bear sufficient indicia of authenticity or otherwise provide some guarantee of trustworthiness. The Unit shall not accept as proof of any criteria of eligibility any record or document that does not bear sufficient indicia of authenticity, or is in such a physical condition, or contains such information, that otherwise indicates the record or document is not reliable or trustworthy. When a record or document is not accepted by the Unit under this section, the claimant or eligible surviving beneficiary shall be notified and afforded the opportunity to submit additional written medical documentation or records in accordance with § 79.52 (b) or (c).

**Subpart B—Eligibility Criteria for Claims Relating to Childhood Leukemia**

**§ 79.10 Scope of subpart.**

The regulations in this subpart describe the criteria for eligibility for compensation under section 4(a)(1) of the Act, and the type and extent of evidence that will be accepted as proof of the various criteria. Section 4(a)(1) of the Act provides for a payment of \$50,000 to individuals presumably exposed to fallout from the detonation of atmospheric nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period, and later

developed leukemia (other than chronic lymphocytic leukemia).

**§ 79.11 Definitions.**

(a) *Affected Area* means the following geographical descriptions, as they were recognized by the state in which they are located, as of October 15, 1990:

(1) In the State of Utah, the counties of Beaver, Garfield, Iron, Kane, Millard, Piute, Sevier and Washington;

(2) In the State of Nevada, the counties of Eureka, Lander, Lincoln, Nye, White Pine, and that portion of Clark County that consists of townships 13 through 16 at ranges 63 through 71;

(3) In the State of Arizona, that portion of the State that is north of the Grand Canyon and west of the Colorado River.

(b) *Physically Present* means the physical presence of a person at any place within the affected area for a substantial period of each day of the time period claimed.

(c) *Designated Time Period* means the period beginning on January 21, 1951 and ending on October 31, 1958, or the period beginning on June 30, 1962 and ending on July 31, 1962, whichever is appropriate.

(d) *First Exposure or Initial Exposure* means the date on which the claimant was first physically present in the affected area during the designated time period.

(e) *Onset or Incidence* of a specified compensable disease means the date the disease was first diagnosed by a physician. However, in the case of leukemia, the date of onset will be presumed to be the date of first diagnosis by a physician unless otherwise established by appropriate authorities at the National Cancer Institute using such written medical documentation as may be prescribed by the Unit as appropriate for an individual case.

(f) *Leukemia* means any medically-recognized form of acute or chronic leukemia, other than chronic lymphocytic leukemia.

**§ 79.12 Criteria for eligibility.**

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must show by a preponderance of the evidence that each of the following criteria are satisfied:

(a) The claimant was physically present in the affected area for either

(1) A period of at least one year during the period beginning on January 21, 1951 and ending on October 31, 1958, OR

(2) The entire period beginning on June 30, 1962 and ending on July 31, 1962;

(b) After such period of physical presence the claimant contacted leukemia;

(c) The claimant's initial exposure occurred prior to age 21; and

(d) The onset of the leukemia occurred between two (2) and thirty (30) years after the date of first exposure.

**§ 79.13 Proof of physical presence.**

(a) For purposes of establishing eligibility under § 79.12(a)(1), the claimant must have been physically present in the affected area for a total of one year, consecutively or cumulatively, during the period beginning on January 21, 1951, and ending on October 31, 1958. For purposes of establishing eligibility under § 79.12(a)(2), the claimant must have been physically present within the affected area continuously during the period beginning on June 30, 1962 and ending July 31, 1962.

(b) Subject to the limitation of § 79.4(c), proof of physical presence may be made by the submission of any trustworthy contemporaneous records that, on their face or in conjunction with other such records, establish that the claimant was present in the affected area during the designated time period. Contemporaneous records from the following sources are presumed to be trustworthy:

(1) Records of the federal government (including verified information submitted for a security clearance), any tribal government, or any state, county, city or local governmental office, agency, department, board or other entity, or other public office or agency;

(2) Records of any accredited public or private educational institution;

(3) Records of any private utility licensed or otherwise approved by any governmental entity, including any such utility providing telephone services;

(4) Records of any public or private library;

(5) Records of any state or local historical society;

(6) Records of any religious organization that has tax-exempt status under section 501(c)(3) of the United States Internal Revenue Code;

(7) Records of any regularly conducted business activity or entity;

(8) Records of any recognized civic or fraternal association or organization;

(9) Medical records created during the designated time period.

(c) Proof of physical presence by contemporaneous records may also be made by submission of original (no copies) postcards and envelopes from letters addressed to the claimant or an immediate family member during the



designated time period which bear a postmark and a cancelled stamp(s).

(d) An individual who resided or was employed on a full-time basis within the affected area is presumed to have been physically present during the time period of residence or full-time employment.

(e) For purposes of establishing eligibility under § 79.12(a)(1), proof of residence at one or more addresses within the affected area at two different dates one year or more apart and less than 2 years apart, and between January 21, 1951 and October 31, 1958, will be presumed to establish physical presence for the necessary one year period.

(f) For purposes of establishing eligibility under § 79.12(a)(1), proof of full-time employment at one location within the affected area at two different dates one year or more apart and less than 2 years apart, and between January 21, 1951 and October 31, 1958, will be presumed to establish physical presence for the necessary one year period.

(g) For purposes of establishing eligibility under § 79.12(a)(2), proof of residence within the affected area at least one day during the period June 30, 1962 to July 31, 1962, and proof of residence at the same address within six months before June 30, 1962, and six months after July 31, 1962, will be presumed to establish physical presence for the necessary one-month-and-one-day period.

(h) For purposes of establishing eligibility under § 79.12(a)(2), proof of full-time employment within the affected area at least one day during the period June 30, 1962 to July 31, 1962, and proof of full-time employment at the same location within six months before June 30, 1962, and six months after July 31, 1962, will be presumed to establish physical presence for the necessary one-month-and-one-day period.

(i) For purposes of establishing eligibility under § 79.12(a)(2), proof of residence or full-time employment at the same address or location on two separate dates at least fourteen (14) days apart within the time period June 30, 1962 to July 31, 1962 will be presumed to establish physical presence for the necessary one-month-and-one-day-period.

(j) A claimant who was a participant in any study for scientific purposes conducted by or under the auspices of any public office or agency, or university medical school, or whose immediate family member was a participant in any such study, need not submit proof of physical residence at the time the claim is filed. The claimant or eligible surviving beneficiary must submit an authorization or release

which authorizes the Radiation Exposure Compensation Unit to review records pertaining to residence created or acquired by the public office or agency, or university medical school, during the course of the study.

(1) If an immediate family member of the claimant was a participant in any such study, and the claimant was not, the claimant or eligible surviving beneficiary must also submit evidence to show that the participant in the study was an immediate family member of the claimant, and that the claimant resided at the same address as the participant during that time period. Absent evidence to the contrary, all members of an immediate family are presumed to reside at the same address, including any children under the age of eighteen (18).

(2) If the records of the study are insufficient to prove the claimant was physically present in the affected area for the specified period of time, the Unit will notify the claimant or eligible surviving beneficiary and afford that person the opportunity to submit contemporaneous records to establish physical presence within the affected area in accordance with § 79.52(c) of these regulations.

#### § 79.14 Proof of initial exposure prior to age 21.

(a) Proof of the claimant's date of birth must be established by the submission of one of the following records:

- (1) Birth certificate;
- (2) Baptismal certificate;
- (3) Tribal records;
- (4) Hospital records of birth.

(b) Absent any indication to the contrary, the earliest date within the designated time period indicated on any records accepted by the Radiation Exposure Compensation Unit as proof of the claimant's physical presence in the affected area will be presumed to be the date of initial exposure.

#### § 79.15 Proof of onset of leukemia between two and thirty years after first exposure.

Absent any indication to the contrary, the earliest date within the designated time period indicated on any records accepted by the Radiation Exposure Compensation Unit as proof of the claimant's physical presence in the affected area will be presumed to be the date of first exposure. The date of onset shall be presumed to be the date of diagnosis as indicated in the medical documentation accepted by the Radiation Exposure Compensation Unit as proof of the claimant's leukemia,

unless otherwise established in accordance with § 79.11(e).

#### § 79.16 Proof of medical condition.

(a) Written medical documentation is required in all cases to prove that the claimant suffered from or suffers from leukemia. Proof that the claimant contracted leukemia must be made either by using the procedure outlined in paragraph (b) of this section or submitting the documentation required in paragraph (c) of this section.

(b) If a claimant was diagnosed as having leukemia in the States of Arizona, Colorado, Nevada, New Mexico, Utah or Wyoming, the claimant or eligible surviving beneficiary need not submit any written medical documentation of disease at the time the claim is filed (although written medical documentation may subsequently be required). Instead, the claimant or eligible surviving beneficiary must submit with the claim an Authorization To Release Medical and Other Information, valid in the state of diagnosis, that authorizes the Unit to contact the appropriate state cancer or tumor registry. The Unit will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of one type of leukemia. If the designated state does not possess medical records or abstracts of medical records that contain a verified diagnosis of leukemia, the Radiation Exposure Compensation Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the written medical documentation required in paragraph (c) of this section, in accordance with the provisions of § 79.52(b).

(c) Proof that the claimant contracted leukemia may be made by the submission of one or more of the following contemporaneous medical records provided that the specified document contains an explicit statement of diagnosis or such other information or data from which appropriate authorities at the National Cancer Institute can make a diagnosis of leukemia to a reasonable degree of medical certainty. If the medical record submitted does not contain sufficient information or data to make such a diagnosis, the Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit additional medical records identified below, in accordance with the provisions of § 79.52(b). The written medical



documentation submitted must also contain sufficient information from which appropriate authorities at the National Cancer Institute can determine the type of leukemia contracted by the claimant.

(1) Bone marrow biopsy or aspirate report;

(2) Peripheral white blood cell differential court report;

(3) Autopsy report;

(4) Hospital discharge summary;

(5) Physician summary;

(6) Death certificate, provided that it is signed by a physician at the time of death.

### Subpart C—Eligibility Criteria for Claims Relating to Certain Specified Diseases

#### § 79.20 Scope of subpart.

The regulations in this subpart describe the criteria for eligibility for compensation under sections 4(a)(2) (A) and (B) of the Act, and the type and extent of evidence that will be accepted as proof of the various criteria. Sections 4(a)(2) (A) and (B) of the Act provide for a payment of \$50,000 to individuals presumably exposed to fallout from the atmospheric detonation of nuclear devices at the Nevada Test Site due to their physical presence in an affected area during a designated time period, and later developed one or more specified compensable diseases.

#### § 79.21 Definitions.

(a) The definitions listed in § 79.11 apply to this subpart.

(b) *Specified compensable diseases* means leukemia, multiple myeloma, lymphomas (other than Hodgkin's disease), and primary cancer of the: Thyroid, female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder and liver.

(c) *Multiple myeloma, lymphoma, Hodgkin's disease, primary cancer of the thyroid, primary cancer of the female breast, primary cancer of the esophagus, primary cancer of the stomach, primary cancer of the pharynx, primary cancer of the small intestine, primary cancer of the pancreas, primary cancer of the bile ducts, primary cancer of the gall bladder and primary cancer of the liver* means the physiological condition or conditions that are recognized by the National Cancer Institute under those names or nomenclature, or under any previously accepted or commonly used names or nomenclature.

(d) *Heavy smoker* means an individual who smoked more than 20 pack years of any kind of tobacco

cigarette products; one pack year is defined as an average of 20 cigarettes per day for one year. This definition does not include the use of cigars or pipe tobacco, or any tobacco products that are used without being lighted.

(e) *Heavy drinker* means an individual who consumed on average for five (5) years at least 4 drinks per day with one and one-half ounces of alcohol, or 4 six-ounce servings per day of wine, or four twelve-ounce servings per day of beer.

(f) *Heavy coffee drinker* means an individual who consumed on average more than 15 6-ounce portions of regular or decaffeinated coffee per day for twenty (20) years.

(g) *Indication of disease* means any medically significant information that suggests the presence of a disease, whether or not the presence of the disease is later confirmed.

#### § 79.22 Criteria for eligibility.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must show by a preponderance of the evidence that each of the following criteria are satisfied:

(a) The claimant was physically present in the affected area for either:

(1) A period of at least two years during the period beginning on January 21, 1951 and ending on October 31, 1958, OR

(2) The entire period beginning on June 30, 1962 and ending on July 31, 1962; and

(b) After such period of physical presence the claimant contracted one of the following specified compensable diseases:

(1) leukemia, provided that: (i) The claimant's initial exposure occurred after the age of 20, and

(ii) The onset of the disease was between 2 and 30 years after first exposure;

(2) Multiple myeloma, provided onset was at least 5 years after first exposure;

(3) Lymphomas, other than Hodgkin's disease, provided onset was at least 5 years after first exposure;

(4) Primary cancer of the thyroid, provided,

(i) The claimant's initial exposure occurred by the age of 20, and

(ii) Onset was at least 5 years after first exposure;

(5) Primary cancer of the female breast, provided, (i) The claimant's initial exposure occurred prior to age 40, and

(ii) Onset was at least 5 years after first exposure;

(6) Primary cancer of the esophagus, provided,

(i) Onset was at least 5 years after first exposure, and

(ii) The claimant was not a heavy smoker, and

(iii) The claimant was not a heavy drinker;

(7) Primary cancer of the stomach, provided,

(i) Initial exposure occurred prior to age 30, and

(ii) Onset was at least 5 years after first exposure;

(8) Primary cancer of the pharynx, provided,

(i) Onset was at least 5 years after first exposure; and

(ii) The claimant was not a heavy smoker;

(9) Primary cancer of the small intestine, provided onset was at least 5 years after first exposure;

(10) Primary cancer of the pancreas, provided,

(i) Onset was at least 5 years after first exposure, and

(ii) The claimant was not a heavy smoker, and

(iii) The claimant was not a heavy coffee drinker;

(11) Primary cancer of the bile ducts, provided onset was at least 5 years after first exposure;

(12) Primary cancer of the gall bladder, provided onset was at least 5 years after first exposure;

(13) Primary cancer of the liver, provided,

(i) Onset was at least 5 years after first exposure, and

(ii) There is no indication of the presence of hepatitis B, and

(iii) There is no indication of the presence of cirrhosis.

#### § 79.23 Proof of physical presence.

(a) For purposes of establishing eligibility under § 79.22(a)(1), the claimant must have been physically present in the affected area for a total of two years, consecutively or cumulatively, during the period beginning on January 21, 1951, and ending on October 31, 1958. For purposes of establishing eligibility under § 79.22(a)(2), the claimant must have been physically present within the affected area during the entire period beginning on June 30, 1962 and ending July 31, 1962.

(b) Proof of physical presence may be made in accordance with the provisions of § 79.13 (b) and (c). An individual who resided or was employed on a full-time basis within the affected area is presumed to have been physically present during the time period of residence or full-time employment.



(c) For purposes of establishing eligibility under § 79.22(a)(1), proof of residence at one or more addresses within the affected area at two different dates two (2) years or more apart and less than three (3) years apart, and between January 21, 1951 and October 31, 1958, will be presumed to establish physical presence for the necessary two year period.

(d) For purposes of establishing eligibility under § 79.22(a)(1), proof of full-time employment at one location within the affected area at two different dates two (2) years or more apart and less than three (3) years apart, and between January 21, 1951 and October 31, 1958, will be presumed to establish physical presence for the necessary two year period.

(e) For purposes of establishing eligibility under § 79.22(a)(2), proof can be made in accordance with the provisions of § 79.13 (g), (h), and (i).

(f) A claimant who was a participant in any study for scientific purposes conducted by or under the auspices of any public office or agency, or university medical school, or whose immediate family member was a participant in any such study, need not submit proof of physical residence at the time the claim is filed. Proof can be made in accordance with the provisions of § 79.13(j).

**§ 79.24 Proof of initial or first exposure after age 20 for claims under § 79.22(b)(1), or before age 20 for claims under section 79.22(b)(4), or before age 40 for claims under § 79.22(b)(5), or before age 30 for claims under § 79.22(b)(7).**

(a) Proof of the claimant's date of birth must be established in accordance with the provisions of subpart B, § 79.14(a).

(b) Absent any indication to the contrary, the earliest date within the designated time period indicated on any records accepted by the Radiation Exposure Compensation Unit as proof of the claimant's physical presence in the affected area will be presumed to be the date of initial or first exposure.

**§ 79.25 Proof of onset of leukemia between two and thirty years after first exposure, and proof of onset of a specified comparable disease more than five years after first exposure.**

Absent any indication to the contrary, the earliest date within the designated time period indicated on any records accepted by the Radiation Exposure Compensation Unit as proof of the claimant's physical presence in the affected area will be presumed to be the date of first or initial exposure. The date of onset will be the date of diagnosis as indicated in the medical documentation

accepted by the Radiation Exposure Compensation Unit as proof of the claimant's specified compensable disease. In the case of leukemia, proof of onset shall be established in accordance with § 79.15.

**§ 79.26 Proof of medical condition.**

(a) Written medical documentation is required in all cases to prove that the claimant suffered from or suffers from any specified compensable disease. Proof that the claimant contracted a specified compensable disease must be made either by using the procedure outlined in paragraph (b) of this section or submitting the documentation required in paragraph (c) of this section. (For claims arising from a specified compensable disease listed in § 79.27 of these regulations, the claimant or eligible surviving beneficiary must also submit the additional written medical documentation prescribed in that section.)

(b) If a claimant was diagnosed as having one of the specified compensable diseases in the States of Arizona, Colorado, Nevada, New Mexico, Utah or Wyoming, the claimant or eligible surviving beneficiary need not submit any medical documentation of disease at the time the claim is filed (although written medical documentation may subsequently be required). Instead, the claimant or eligible surviving beneficiary must submit with the claim an Authorization To Release Medical and Other Information, valid in the state of diagnosis, that authorizes the Unit to contact the appropriate state cancer or tumor registry. The Unit will accept as proof of medical condition verification from the state cancer or tumor registry that it possesses medical records or abstracts of medical records of the claimant that contain a verified diagnosis of one of the specified compensable diseases. If the designated state does not possess medical records or abstracts of medical records that contain a verified diagnosis of one of the specified compensable diseases, the Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the written medical documentation required in paragraph (c) of this section, in accordance with the provisions of § 79.52(b).

(c) Proof that the claimant contracted a specified compensable disease may be made by the submission of one or more of the following contemporaneous medical records, provided that the specified document contains an explicit statement of diagnosis and such other information or data from which the appropriate authorities with the

National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty. If the medical record submitted does not contain sufficient information or data to make such a diagnosis, the Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit additional medical records identified below, in accordance with the provisions of § 79.52(b). The medical documentation submitted under this section to establish that the claimant contracted leukemia or a lymphoma must also contain sufficient information from which the appropriate authorities with the National Cancer Institute can determine the type of leukemia or lymphoma contracted by the claimant. Proof of leukemia shall be made by submitting one or more of the documents listed in § 79.16(c).

(1) *Multiple myeloma.* (i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) Report of serum electrophoresis;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Hematology summary or consultation report;

(D) Oncology summary or consultation report;

(E) X-ray report;

(v) Death certificate, provided that it is signed by a physician at the time of death.

(2) *Lymphomas.* (i) Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Hematology consultation or summary report;

(D) Oncology consultation or summary report;

(iv) Death certificate, provided that it is signed by a physician at the time of death.

(3) *Cancer of the thyroid.* (i) Pathology report of tissue biopsy or fine needle aspirate;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary;

(C) Operative summary report;

(D) Oncology summary or consultation report;

(iv) Death certificate, provided that it is signed by a physician at the time of death.



(4) *Cancer of the female breast.* (i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary;

(C) Operative report;

(D) Oncology summary or

consultation report;

(E) Radiotherapy summary or consultation report;

(iv) Report of mammogram;

(v) Report of bone scan;

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(5) *Cancer of the esophagus.* (i)

Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Endoscopy report;

(iv) One of the following summary medical report:

(A) Physician summary report;

(B) Hospital discharge summary

report;

(C) Operative report;

(D) Radiotherapy report;

(E) Oncology consultation or summary report;

(v) One of the following radiological studies:

(A) Esophagram;

(B) Barium swallow;

(C) Upper gastrointestinal (GI) series;

(D) Computerized tomography (CT)

scan;

(E) Magnetic resonance imaging (MRI);

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(6) *Cancer of the stomach.* (i)

Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Endoscopy or gastroscopy report;

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary

report;

(C) Operative report;

(D) Radiotherapy report;

(E) Oncology summary report;

(v) One of the following radiological studies:

(A) Barium swallow;

(B) Upper gastrointestinal (GI) series;

(C) Computerized tomography (CT)

series;

(D) Magnetic resonance imaging (MRI);

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(7) *Cancer of the pharynx.* (i)

Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) Endoscopy report;

(iv) One of the following summary medical reports:

(A) Physician summary;

(B) Hospital discharge summary;

(C) Report of otolaryngology

examination;

(D) Radiotherapy summary report;

(E) Oncology summary report;

(F) Operative report;

(v) Report of one of the following radiological studies:

(A) Laryngograms;

(B) Tomograms of soft tissue and lateral radiographs;

(C) Computerized tomography (CT) scan;

(D) Magnetic resonance imaging (MRI);

(vi) Death certificate, provided that it is signed by a physician at the time of death.

(8) *Cancer of the small intestine.* (i)

Pathology report of tissue biopsy;

(ii) Autopsy report;

(iii) Endoscopy report, provided the examination covered the duodenum and parts of the jejunum;

(iv) Colonoscopy report, providing the examination covered the distal ileum;

(v) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary;

(C) Report of gastroenterology examination;

(D) Operative report;

(E) Radiotherapy summary report;

(F) Oncology summary or consultation report;

(vi) Report of one of the following radiologic studies:

(A) Upper gastrointestinal (GI) series with small bowel followthrough;

(B) Angiography;

(C) Computerized tomography (CT) scan;

(D) Magnetic resonance imaging (MRI);

(vii) Death certificate, provided that it is signed by a physician at the time of death.

(9) *Cancer of the pancreas.* (i)

Pathology report of tissue biopsy or fine needle aspirate;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary

report;

(C) Radiotherapy summary report;

(D) Oncology summary report;

(iv) Report of one of the following radiographic studies:

(A) Endoscopic retrograde cholangiopancreatography (ERCP);

(B) Upper gastrointestinal (GI) series;

(C) Arteriography of the pancreas;

(D) Ultrasonography;

(E) Computerized tomography (CT) scan;

(F) Magnetic resonance imaging (MRI);

(v) Death certificate, provided that it is signed by a physician at the time of death.

(10) *Cancer of the bile duct.*

(i) Pathology of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Gastroenterology consultation report;

(E) Oncology summary or consultation report;

(iv) Report of one of the following radiographic studies:

(A) Ultrasonography;

(B) Endoscopic retrograde cholangiography;

(C) Percutaneous cholangiography;

(D) Computerized tomography (CT) scan;

(v) Death certificate, provided that it is signed by a physician at the time of death.

(11) *Cancer of the gall bladder.* (i)

Pathology report of tissue from surgical resection;

(ii) Autopsy report;

(iii) Report of one of the following radiological studies:

(A) Computerized tomography (CT) scan;

(B) Magnetic resonance imaging (MRI);

(C) Ultrasonography (ultrasound);

(iv) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;

(C) Operative report;

(D) Radiotherapy report;

(E) Oncology summary or report;

(v) Death certificate, provided that it is signed by a physician at the time of death.

(12) *Cancer of the liver.* (i) Pathology report of tissue biopsy or surgical resection;

(ii) Autopsy report;

(iii) One of the following summary medical reports:

(A) Physician summary report;

(B) Hospital discharge summary report;



- (C) Oncology summary report;
- (D) Operative report;
- (E) Gastroenterology report;
- (iv) Report of one of the following radiological studies:
  - (A) Computerized tomography (CT) scan;
  - (B) Magnetic resonance imaging (MRI);
  - (v) Death certificate, provided that it is signed by a physician at the time of death.

**§ 79.27 Proof of no heavy smoking, no heavy drinking, no heavy coffee drinking, and no indication of disease.**

(a) If the claimant or eligible surviving beneficiary is claiming eligibility under this Subpart for primary cancer of the esophagus, stomach, pharynx, pancreas, or liver, the claimant or eligible surviving beneficiary must submit in addition to proof of the disease, all medical records listed below from any hospital or medical facility that were created within the period six (6) months before and six (6) months after the date of diagnosis:

- (1) All history and physical examination reports;
- (2) All operative reports;
- (3) All pathology reports;
- (4) All physician or hospital discharge summaries.

(b) If the medical records listed above, or the medical records possessed by the state cancer or tumor registry, contain information reflecting that the claimant was a heavy smoker or a heavy drinker, or establish that there was an indication of disease, the Radiation Exposure Compensation Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit other written medical documentation or contemporaneous records to establish that the claimant was not a heavy smoker, not a heavy drinker, or that there was no indication of disease, in accordance with the provisions of § 79.52(b).

(c) In the case of primary cancer of the pancreas, the claimant or each eligible surviving beneficiary shall execute and provide an affidavit (or declaration under oath on the standard claim form) that sets forth the amount of regular or decaffeinated coffee that the claimant consumed on average per day for the twenty year period immediately prior to the date the claimant was diagnosed with primary cancer of the pancreas.

**Subpart D—Uranium Miners**

**§ 79.30 Scope of subpart.**

The regulations in this Subpart define the eligibility criteria for compensation

under section 5 of the Act, and the type and extent of evidence that will be accepted as proof of the prescribed criteria. Section 5 of the Act provides for a payment of \$100,000 to individuals who contracted lung cancer or one of a limited number of non-malignant respiratory diseases following exposure to defined minimum levels of radiation during employment in a uranium mine or uranium mines in certain states during the period beginning January 1, 1947 and ending December 31, 1971.

**§ 79.31 Definitions.**

(a) *Employment In A Uranium Mine* means any mining-related activity at a uranium mine that principally occurred underground. These activities/occupations include, but are not limited to: miner, miner's helper (nipper), production driller, long hole driller, tram operator (trammer, or motorman), equipment operator (mucker), slusher operator (slusherman), laborer (bull gang), powderman, timberman, hoistman, skip tender, underground truck driver (trucker), shift foreman (boss, shifter, or leadman), mechanic, electrician, geologist, surveyor, surveyor's helper (rodman), grade controller (prober), air sampler, safety engineer, and mine superintendent (super). Noncompany personnel performing the following activities/occupations include, but are not limited to: mine inspectors, health physicists, and Atomic Energy Commission (AEC) geologists and engineers.

(b) *Uranium Mine* means an underground excavation, regardless of the means of access, the primary or significant purpose of which was the extraction of uranium ore. Strip, rim, or open pit mines are excluded.

(c) *Working Level* means any concentration of the short half-life daughters of radon that will release  $1.3 \times 10^5$  million electron volts of alpha energy per liter of air;

(d) *Working Level Month* means radiation exposure at the level of one working level every work day for a working month (170 hours), or an equivalent cumulative exposure over a greater or lesser amount of time.

(e) *Non-smoker* means an individual who never smoked tobacco cigarette products or smoked less than the amount defined in paragraph (f), below.

(f) *Smoker* means an individual who has smoked at least one (1) pack year of cigarette products.

(g) *Onset or Incidence* means the date the disease was first diagnosed by a physician.

(h) *Primary Lung Cancer* means any physiological condition of the lung, trachea, and bronchus that is recognized

under that name or nomenclature by the National Cancer Institute. The term excludes cancers *in situ*.

(i) *Nonmalignant respiratory disease* means any of the following:

(1) Pulmonary fibrosis, fibrosis of the lung, or

(2) Cor pulmonale related to fibrosis of the lung, or

(3) Moderate or severe silicosis or pneumoconiosis, provided that the claimant, whether an Indian or non-Indian,

(i) Worked in a uranium mine or mines located on or within an Indian Reservation, and

(ii) Worked in such a mine or mines for a period of time sufficient to meet the minimum working level criteria for the claimant set forth in § 79.32(c).

(j) *Fibrosis of the Lung or Pulmonary Fibrosis* for purposes of the Act and these regulations means chronic inflammation and scarring of the pulmonary interstitium and alveoli with collagen deposition and progressive thickening causing pulmonary impairment.

(k) *Cor pulmonale* means heart disease, including hypertrophy of the right ventricle, due to pulmonary hypertension secondary to fibrosis of the lung.

(l) *Silicosis* means a pneumoconiosis due to the inhalation of the dust of stone, sand, flint or other materials containing silicon dioxide, characterized by the formation of pulmonary fibrotic changes.

(m) *Pneumoconiosis* means a chronic lung disease resulting from inhalation and deposition in the lung of particulate matter, and the tissue reaction to the presence of the particulate matter. For the purposes of this Act, the claimant's exposure to the particulate matter that led to the disease must have occurred during employment in a uranium mine.

(n) *Indian Reservation* means territory held in trust by the United States for any Indian Tribe at any time between January 1, 1947 and December 31, 1971.

(o) *Designated Time Period* means any time during the period beginning on January 1, 1947 and ending on December 31, 1971.

(p) *Specified States* means the states of Arizona, Colorado, New Mexico, Utah and Wyoming.

(q) *Readily Available Documentation* means documents in the possession, custody or control of the claimant or an immediate family member.

(r) *Certified "B" Reader* means a physician who has demonstrated proficiency in evaluating chest roentgenograms (x-rays) for quality and for the presence of pneumoconiosis and



other roentgenographic abnormalities and is certified (and recertified, as may be appropriate) by the National Institute for Occupational Safety and Health. A list of certified "B" readers is available from the Radiation Exposure Compensation Unit upon request.

#### § 79.32 Criteria for eligibility.

To establish eligibility for compensation under this Subpart, a claimant or eligible surviving beneficiary must show by a preponderance of the evidence that each of the following criteria are satisfied:

(a) The claimant was employed in a uranium mine or mines in the states of Arizona, Colorado, New Mexico, Wyoming or Utah;

(b) The Claimant was so employed during the period beginning on January 1, 1947 and ending on December 31, 1971;

(c) The claimant contracted primary lung cancer or a non-malignant respiratory disease, and

(1) If a non-smoker, the claimant was exposed during the course of his/her employment in a uranium mine to more than 200 working level months of radiation, or

(2) If a smoker, then

(i) If the incidence of the cancer or the non-malignant respiratory disease occurred before the age of 45, the claimant was exposed during the course of his/her employment in a uranium mine to more than 300 working level months of radiation; or

(ii) If the incidence of the cancer or the non-malignant respiratory disease occurred after the age of 45, the claimant was exposed during the course of his/her employment in a uranium mine to more than 500 working level months of radiation.

#### § 79.33 Proof of employment in a uranium mine.

(a) Information regarding a claimant's uranium mining employment history contained in records held by any of the sources listed in this subsection will be accepted as proof of employment for the time period indicated on the records. The employment history for the time period indicated in the records is presumed to be correct. If the claimant or eligible surviving beneficiary contests the accuracy of the records specified in this subsection, then the claimant or eligible surviving beneficiary may provide one or more of the records identified in paragraph (b) of this section, and the Assistant Director will determine whether there is a preponderance of the evidence that the employment history from the records in this subsection is incorrect.

(1) Records created by or gathered by the Public Health Service (PHS) in the course of any health studies conducted of uranium miners during or including the period 1947-1971;

(2) Records of a uranium miner census performed by the PHS at various times during the period 1947-1971;

(3) Records of the Atomic Energy Commission (AEC), or any of its successor agencies; and

(4) Records of federally-supported health-related studies of uranium miners including:

(i) Studies conducted by Dr. Geno Saccamanno, M.D., St. Mary's Hospital, Grand Junction, Colorado;

(ii) Studies conducted by Dr. Jonathan Samet, M.D., University of New Mexico School of Medicine.

(b) If the sources in paragraph (a) of this section do not contain information on the claimant's uranium mining employment history, or contain insufficient employment history information to establish exposure to the number of working level months required for the claimant to qualify under the appropriate provision of § 79.32(c), a claimant or eligible surviving beneficiary may submit records from any of the sources listed in paragraph (b)(1) of this section to establish periods of uranium mining employment in addition to the periods of employment established by the sources in paragraph (a) of this section.

(1) The claimant or eligible surviving beneficiary may submit:

(i) Records of any of the specified states, including records of state regulatory agencies, containing information on uranium miners and uranium mines;

(ii) Records of any business entity that owned or operated a uranium mine, or its successor-in-interest;

(iii) Records of the Social Security Administration reflecting the identity of the employer, the year and quarter of employment, and the wages received during each quarter;

(iv) Federal or state income tax records that contain appropriate statements regarding the claimant's employer and wages;

(v) Records containing factual findings by any governmental judicial body, state workers compensation board, or any governmental administrative body adjudicating the claimant's rights to any type of benefits; records from any such source will be accepted only to prove the fact of and duration of employment in a uranium mine;

(vi) Statements in medical records created between 1947 and 1971 indicating or identifying the claimant's employer and occupation;

(vii) Records of an academic or scholarly study, not conducted in anticipation of or in connection with any litigation, and completed prior to 1990; or

(viii) Any other contemporaneous record that indicates or identifies the claimant's occupation or employer.

(2) To the extent that the documents submitted from the sources identified in paragraph (b)(1) of this section do not so indicate, the claimant or eligible surviving beneficiary must set forth under oath on the standard claim form the following information, if known:

(i) The name or other identifying symbol of each mine in which the claimant worked during the time period identified in the documents;

(ii) The mining district, county and state in which each mine was located;

(iii) The actual time period he/she worked in each mine; and

(iv) The claimant's occupation in each mine.

(3) If records of the Unit indicate that any mine specified by the claimant or eligible surviving beneficiary was not an underground uranium mine, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity to submit records to establish that the mine was an underground mine in accordance with § 79.52(c).

(4) If the claimant or eligible surviving beneficiary cannot provide under paragraph (b)(2) of this section, the name or location of any uranium mine at which the claimant was employed, then, if possible, this information will be determined by utilizing records reflecting the types of mines operated or owned by the entity for whom the claimant worked.

(i) If such records establish that the business for which the claimant worked owned or operated *only* underground uranium mines during the time period indicated in the records, the claimant will be presumed to have been employed in an underground uranium mine for the indicated time period;

(ii) If such records establish that the entity for which the claimant worked owned or operated predominantly underground uranium mines in the state and during the time period indicated in the records, the claimant will be presumed to have been employed in an underground uranium mine during this time period.

(iii) If such records establish that the entity for which the claimant worked owned or operated predominantly open pit, strip or rim mines in the state and during the time periods indicated in the records, the claimant may be presumed



to have been employed in a rim, strip, or open pit mine.

(5) If the claimant or eligible surviving beneficiary cannot provide under paragraph (b)(2) of this section, the time period the claimant was employed in each uranium mine, the time period will be determined in the following manner:

(i) If records of the Social Security Administration exist which indicate the claimant's work history, the period of employment will be estimated by dividing the gross quarterly income by the average pay rate per hour for the claimant's occupation;

(ii) If Social Security records do not exist, but other records exist which indicate that the claimant was employed in a uranium mine on the date recorded in the record, but do not indicate the period of employment, then the following presumptions shall be applied:

(A) If the records indicate that the claimant worked at the same mine or for the same uranium mining company on two different dates at least 3 months apart but less than 12 months apart, the claimant will be presumed to have been employed at the mine or for the mining company for the entire 12 month period beginning on the earlier date.

(B) If the records indicate that the claimant worked at the same mine or for the same uranium mining company on two different dates at least 1 month apart but less than 6 months apart, the claimant will be presumed to have been employed at the mine or for the mining company for the entire 6 month period beginning on the earlier date;

(C) If the records indicate that the claimant worked at any mine or for a uranium mining company on any date within the designated time period, but the claimant is not entitled to any of the presumptions listed above, the claimant will be presumed to have been employed at the mine or for the mining company for a 6 month period, three months before and three months after the date indicated.

(c) The Unit may, for the purpose of verifying information submitted pursuant to this section, require the claimant or any eligible surviving beneficiary to provide an authorization to release any record identified in this section, in accordance with the provisions of § 79.52(c).

#### § 79.34 Proof of working level month exposure to radiation.

(a) If one or more of the sources in § 79.33(a) contain a calculated total of Working Level Months (WLMs) of radiation for the claimant equal to or greater than the number of WLMs required for the claimant to qualify under the appropriate provision of

§ 79.32(c), the number will be presumed to be correct and the claimant or eligible surviving beneficiary need not submit additional records.

(b) If the sources in § 79.33(a) do not contain a calculated total of WLMs or radiation for the claimant, or contain a calculated total that is less than the criterion set forth in the appropriate provision of § 79.32(c), a claimant or eligible surviving beneficiary may submit records from the sources listed below which reflect a calculated number of WLMs of radiation for periods of employment established under § 79.33(b). If the number of WLMs established under this subsection, plus the number established under paragraph (a) of this section is equal to or greater than the number of WLMs required for the claimant to qualify under the appropriate provision of § 79.32(c), the claimant or eligible surviving beneficiary need not submit additional records.

(1) Certified copies of records of regulatory agencies of the specified states, provided that the records indicate the mines at which the claimant was employed, the time period of the claimant's employment in each mine, the exposure level in each mine during the claimant's employment, and the calculations on which the claimant's WLMs are based, unless the calculation is obvious;

(2) Certified copies of records of the owner or operator of a uranium mine in the specified states with the same provisions as noted in paragraph (b)(1) of this section.

(c) When the sources referred to in paragraphs (a) and (b) of this section contain a calculated number of WLMs, but the number is insufficient to meet the appropriate criterion in § 79.32(c), additional WLMs may be determined for remaining periods of employment established under § 79.33 (a) and (b) in the manner set forth in paragraphs (d) through (h) of this section.

(d) To the extent that the sources referred to in paragraphs (a) and (b) of this section do not contain a calculated number of WLMs, but do contain annual exposure levels measured in Working Levels (WLs) for mines in which the claimant was employed, then the claimant's exposure to radiation measured in WLMs will be calculated in the manner set forth in paragraph (h) of this section.

(e) For periods of employment in an underground uranium mine established under § 79.33(b) (1) or (2) where paragraph (d) of this section is not applicable, the following sources will be used in computing the annual exposure level measured in WLs in each mine for

the period of the claimant's employment set forth in paragraph (g) of this section.

(1) Records of the AEC, or its successor agencies;

(2) Records of the PHS, including radiation level measurements taken in the course of health studies conducted of uranium miners during or including the period 1947-1971;

(3) Records of the United States Bureau of Mines;

(4) Records of regulatory agencies of the specified states; or

(5) Records of the business entity that was the owner or operator of the mine.

(f) For periods of employment in an underground uranium mine established under § 79.33(b)(3), the annual exposure level measured in WLs in the unknown mine(s) will be determined by calculating an average of the annual exposure levels measured in WLs in all the underground uranium mines owned or operated by the entity for which the claimant worked during the appropriate time period and in the identified state.

(g) The following methodology will be employed for calculating the annual exposure level measured in WLs for each mine:

(1) If one or more radiation measurements are available for a mine in a given year, these values are averaged to generate the WLs for the mine for that year.

(2) If radiation measurements exist for the mine, but not for the year in which the claimant was employed in the mine, the WLs for the mine for that year will be estimated if possible as follows:

(A) If annual average measurements exist within four (4) years of the year in which the claimant was employed in the mine, the measurements for the two years closest will be averaged, and that value will be assigned to the year the claimant was employed in the mine;

(B) If one or more annual average measurements exist for a mine, but are not more than five (5) years from the year the claimant was employed, the annual average closest in time will be assigned either forward or backward in time for two years.

(3) If the methods described in paragraph (g) (1) and (2) of this section interpolate or project the annual exposure level measured in WLs for a mine in a year in which the claimant was employed in the mine, an estimated average for mines in the same geographical area will be used for that year. An estimated area average is calculated as follows:

(A) If actual measurements from three or more mines, totaling at least ten measurements, are available from mines in the same locality as the mine in which



the claimant was employed, the average of the measurements for the mines within that locality will be used.

(B) If there were insufficient actual measurements from mines in the same locality to use the method in paragraph (g)(3)(A) of this section, an average of exposure levels in mines in the same mining district will be used if there are at least ten measurements from at least three mines in that district.

(C) If there are insufficient actual measurements from mines in the same mining district, the average of exposure levels in mines in the same state will be used.

(D) If there are insufficient actual measurements from mines in the same state, the estimated average for the state of Colorado for that year will be used.

(4) If the year in which the claimant was employed in the mine was 1947 to 1949, the annual exposure level measured in WLMs will be estimated by averaging the earliest recorded exposure levels in mines of the same or similar type, ventilation, and ore composition closest to the mine.

(h) A claimant's total exposure to radiation expressed in WLMs, for purposes of establishing eligibility under § 79.32(c), will be calculated in the following manner:

(1) The annual exposure level measured in WLMs for each mine for periods of employment established under § 79.33(b) will be calculated by using the methodology in paragraph (f) of this section;

(2) The annual exposure level measured in WLMs for each mine will be multiplied by the time period, measured in months, that the claimant was employed in the mine, yielding a claimant's exposure to radiation expressed in WLMs;

(3) The claimant's exposure to radiation expressed in WLMs for each mine in which the claimant was employed in one of the specified states during the designated time period will be added together to yield the claimant's total exposure to radiation expressed in WLMs.

#### § 79.35 Proof of lung cancer.

(a) Written medical documentation is required in all cases to prove that the claimant developed primary cancer of the lung. Proof that the claimant developed primary cancer of the lung must be made either by using the procedure outlined in paragraphs (b), (c) or (d) of this section or submitting the documentation required in paragraph (e) of this section.

(b) *Verification by PHS or NIOSH records.* In all cases the Radiation Exposure Compensation Unit will

search the records of the PHS or the National Institute for Occupational Safety and Health (NIOSH) created or gathered during the course of any health studies conducted or being conducted by these agencies of uranium miners during or including the period 1947-1971, to determine whether the records contain proof of the claimant's eligibility. The Unit will accept as proof of medical condition the verification of the PHS or NIOSH that they possess medical records or abstracts of medical records of the claimant that contain a verified diagnosis of lung cancer. If these agencies do not possess medical records or abstracts of medical records that contain a verified diagnosis of lung cancer, the Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the written medical documentation required in paragraph (e) of this section, in accordance with the provisions of § 79.52(b).

(c) *Verification by the State Cancer or Tumor Registry.* If a claimant was diagnosed as having primary cancer of the lung in the States of Arizona, Colorado, Nevada, New Mexico, Utah, or Wyoming, the claimant or eligible surviving beneficiary need not submit any written medical documentation of medical condition at the time the claim is filed (although written medical documentation may subsequently be required). Instead, the claimant or eligible surviving beneficiary must submit with the claim an Authorization To Release Medical or Other Information, valid in the state of diagnosis, that authorizes the Radiation Exposure Compensation Unit to contact the appropriate state cancer or tumor registry. The Unit will accept as proof of medical condition verification from the state cancer or tumor registry that they possess medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary cancer of the lung. If the state does not possess medical records or abstracts of medical records that contain a verified diagnosis of primary cancer of the lung, the Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the written medical documentation required in paragraph (e) of this section, in accordance with the provisions of § 79.52(b).

(d) *Verification by a Federally-Supported Health-Related Study.* If medical records regarding the claimant were gathered during the course of any federally-supported health-related study of uranium miners, the claimant or eligible surviving beneficiary need not submit any written medical

documentation of medical condition at the time the claim is filed (although written medical documentation may subsequently be required). Instead, the claimant or eligible surviving beneficiary must submit with the claim an Authorization To Release Medical or Other Information, valid in the state of diagnosis, that authorizes the Unit to contact the custodian of the records of the study to determine if proof of the claimant's eligibility is contained in the records of the study. The Unit will accept as proof of medical condition copies of medical records or abstracts of medical records of the claimant that contain a verified diagnosis of primary cancer of the lung. If the custodian does not possess medical records or abstracts of medical records that contain a verified diagnosis of primary cancer of the lung, the Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit the written medical documentation required in paragraph (e) of this section, in accordance with the provisions of § 79.52(b).

(e) Proof that the claimant contracted primary lung cancer may be made by the submission of one or more of the following contemporaneous medical records, provided that the specified document contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities at the National Cancer Institute can make a diagnosis to a reasonable degree of medical certainty.

(1) Pathology report of tissue biopsy, including, but not limited to specimens obtained by any of the following methods:

- (i) Surgical resection;
- (ii) Endoscopic endobronchial or transbronchial biopsy;
- (iii) Bronchial brushings and washings;
- (iv) Pleural fluid cytology;
- (v) Fine needle aspirate;
- (vi) Pleural biopsy;
- (vii) Sputum cytology;

(2) Autopsy report;

(3) Bronchoscopy report;

(4) One of the following summary medical reports:

- (i) Physician summary report;
- (ii) Hospital discharge summary report;
- (iii) Operative report;
- (iv) Radiation therapy summary report;
- (v) Oncology summary or consultation report;

(5) Reports of radiographic studies, including:

- (i) X-rays of the chest;
- (ii) Chest tomograms;



- (iii) Computer-assisted tomography (CT);
- (iv) Magnetic resonance imaging (MRI);
- (6) Death certificate, provided that it is signed by a physician at the time of death.

#### § 79.36 Proof of non-malignant respiratory disease.

(a) Written medical documentation is required in all cases to prove to a reasonable degree of medical certainty that the claimant developed a non-malignant respiratory disease. Proof that the claimant developed a non-malignant respiratory disease must be made either by using the procedure outlined in paragraphs (b) or (c) of this section, or submitting the documentation required in paragraph (d) of this section.

(b) *Verification by PHS or NIOSH records.* In all cases the Radiation Exposure Compensation Unit will follow the procedures set forth in § 79.35(b) to establish the claimant's eligibility based on the development of a non-malignant respiratory disease.

(c) *Verification by a federally-supported health-study.* The Unit will follow the procedures set forth in section 79.35(d) to establish the claimant's eligibility based on the development of a non-malignant respiratory disease.

(d) Proof that the claimant contracted a non-malignant respiratory disease may be made by the submission of the following contemporaneous medical records, provided that the specified document contains an explicit statement of diagnosis or such other information or data from which the appropriate authorities designated by the Surgeon General or NIOSH can make a diagnosis to a reasonable degree of medical certainty. For purposes of this section, a statement of diagnosis in any of the Indian Health Service records listed below of "restrictive lung disease" will be considered equivalent to a diagnosis of pulmonary fibrosis.

(1) Pulmonary fibrosis or fibrosis of the lung.

(i) If the claimant is deceased, one or more of the following medical records:

- (A) Pathology report of tissue biopsy;
- (B) Autopsy report;

(C) If X-rays exist, the x-rays and interpretive reports of the x-ray(s) by two certified "B" readers classifying the existence of fibrosis of Category 1/0 or higher according to the ILO 1980, or subsequent revisions;

(D) If no x-rays exist, an x-ray report;

(E) Physician summary report;

(F) Hospital discharge summary report;

(G) Hospital admitting report;

(H) Death Certificate, provided that it is signed by a physician at the time of death.

(ii) If the claimant is alive, the following:

(A) *Chest x-rays.* A chest x-ray administered in accordance with standard techniques on full size film at quality 1 or 2, and interpretative reports of the x-ray by two certified "B" readers classifying the existence of fibrosis of category 1/0 or higher according to the ILO 1989, or subsequent revisions; and either:

(B) *Pulmonary function tests.* Pulmonary function tests consisting of three tracings recording the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC) administered and reported in accordance with the Standardization of Spirometry—1987 Update by the American Thoracic Society, and reflecting values for FEV1 or FVC that are equal to or less than 75% of the predicted value for an individual of the claimant's age, sex, and height, as set forth in the Tables in appendix A of this part; or

(C) *Arterial blood-gas studies.* A blood-gas study administered at rest in a sitting position, or an exercise blood-gas test, and reflecting values equal to or less than the values set forth in the Tables in appendix B of this part.

(2) *Cor pulmonale.* Proof of pulmonary fibrosis as prescribed in paragraph (d)(1) of this section and one or more of the following medical records:

- (i) Right heart catheterization;
- (ii) Cardiology summary or consultation report;
- (iii) Electrocardiogram;
- (iv) Echocardiogram;
- (v) Physician summary report;
- (vi) Hospital discharge report;
- (vii) Autopsy report;
- (viii) Report of physical examination;
- (ix) Death certificate, provided that it is signed by a physician at the time of death.

(3) *Moderate or severe silicosis or pneumoconiosis.* To establish eligibility for compensation for silicosis or pneumoconiosis, a claimant or eligible surviving beneficiary must:

- (i) Submit the same documentation as is prescribed in paragraph (d)(1) of this section for proof of pulmonary fibrosis; and
- (ii) Submit proof of employment in a uranium mine on an Indian Reservation in accordance with the provisions of § 79.33. A claimant or eligible surviving beneficiary must establish that the claimant was employed in a uranium mine on an Indian reservation for a sufficient

period of time to meet the exposure criteria set forth in § 79.32(c).

#### § 79.37 Proof of smoking, nonsmoking, and age.

(a) The claimant or eligible surviving beneficiary must submit all medical records listed below from any hospital or medical facility that were created within the period six (6) months before and six (6) months after the date of diagnosis of lung cancer or the nonmalignant respiratory disease:

- (1) All history and physical examination reports;
- (2) All operative reports;
- (3) All pathology reports;
- (4) All physician or hospital discharge summaries.

(b) If the medical records listed in paragraph (a) of this section or the information possessed by the PHS, NIOSH, state authorities, or the custodian of a federally-supported health-related study contains information indicating that the claimant was a smoker, the Radiation Exposure Compensation Unit will notify the claimant or eligible surviving beneficiary and afford that individual the opportunity to submit other written medical documentation or contemporaneous records to establish that the claimant was not a smoker in accordance with the provisions of § 79.52(b).

#### Subpart E—Eligibility Criteria for Claims by Onsite Participants

##### § 79.40 Scope of subpart.

The regulations in this Subpart describe the criteria for eligibility for compensation under section 4(a)(2)(C) of the Act, and define the type and extent of evidence that will be accepted as proof of the prescribed criteria. Section 4(a)(2)(C) of the Act provides for a payment of \$75,000 to individuals who participated onsite in the atmospheric detonation of a nuclear device, and later developed a specified compensable disease.

##### § 79.41 Definitions.

(a) The definitions listed in §§ 79.11(e) and (f), 79.21(b) through (g) apply to this subpart.

(b) *First exposure or initial exposure* means the date on which the claimant first participated onsite in an atmospheric nuclear test.

(c) *Onsite* means physical presence above or within the official boundaries of any of the following locations:

- (1) The Nevada Test Site, Nevada;
- (2) The Pacific Test Sites (Bikini Atoll, Eniwetok Atoll, Johnston Island,



Christmas Island, the test site for the shot during Operation Wigwam, the test site for Shot Yucca during Operation Hardtack I, and the test sites for Shot Frigate Bird and Shot Swordfish during Operation Dominic I) and the official zone around each site from which non-test affiliated ships were excluded for security and safety purposes;

(3) The Trinity Test Site, New Mexico;

(4) The South Atlantic Test Site for Operation Argus and the official zone around the site from which non-test affiliated ships were excluded for security and safety purposes;

(5) Any designated location within a Naval Shipyard, Air Force Base, or other official government installation where ships, aircraft or other equipment used in an atmospheric nuclear detonation were decontaminated; or

(6) Any designated location used for the purpose of monitoring fallout from an atmospheric nuclear test conducted at the Nevada Test Site.

(d) *Participant* means

(1) An individual who was:

(i) A member of the armed forces;

(ii) A civilian employee or contractor employee of the Manhattan Engineer District, the Armed Forces Special Weapons Project, the Defense Atomic Support Agency, the Defense Nuclear Agency, the Department of Defense or its components or agencies or predecessor components or agencies;

(iii) An employee or contractor employee of the Atomic Energy Commission, the Energy Research and Development Administration or Department of Energy;

(iv) A member of the Federal Civil Defense Administration or the Office of Civil and Defense Mobilization; or

(v) A member of the U.S. Public Health Service; and

(2) Who:

(i) Performed duties within the identified operational area around each atmospheric nuclear test;

(ii) Participated in the decontamination of any ships, planes, or equipment used during the atmospheric nuclear test;

(iii) Performed duties as a cloud tracker or cloud sampler;

(iv) Served as a member of the garrison or maintenance forces on the atoll of Enewetak during June 21, 1951 through July 1, 1952; August 7, 1956 through August 7, 1957; or November 1, 1958 through April 30, 1959; or

(v) Performed duties as a member of a mobile radiological safety team monitoring the pattern of fallout from an atmospheric nuclear test.

(e) *Atmospheric Detonation of a Nuclear Device* means only those tests conducted by the United States prior to

January 1, 1963, as listed in paragraph (f) of this section.

(f) *Period of Atmospheric Nuclear Testing* means the periods listed in this paragraph that are associated with each test operation, plus an additional six (6) month period thereafter:

(1) For Operation Trinity, the period July 16, 1945 through August 6, 1945:

Event name	Date	Location
Trinity .....	07/16/45	TTS.

(2) For Operation Crossroads, the period June 28, 1946 through August 31, 1946, for all activities other than the decontamination of ships involved in Operation Crossroads; the period of atmospheric nuclear testing for the decontamination of ships involved in Operation Crossroads shall run from June 28, 1946 through November 30, 1948:

Able .....	07/01/46	Bikini.
Baker .....	07/25/46	Bikini.

(3) For Operation Sandstone, the period April 13, 1948 through May 20, 1948:

X-ray .....	04/15/48	Enewetak.
Yoke .....	05/01/48	Enewetak.
Zebra .....	05/15/48	Enewetak.

(4) For Operation Ranger, the period January 27, 1951 through February 7, 1951:

Able .....	01/27/51	NTS.
Baker .....	01/28/51	NTS.
Easy .....	02/01/51	NTS.
Baker-2 .....	02/02/51	NTS.
Fox .....	02/06/51	NTS.

(5) For Operation Greenhouse, the period April 5, 1951 through June 20, 1951, for all activities other than service as a member of the garrison or maintenance forces on the atoll of Enewetak during June 21, 1951, and July 1, 1952; the period of atmospheric nuclear testing for service as a member of the garrison or maintenance forces on the atoll of Enewetak shall run from April 5, 1951, through July 1, 1952:

Dog .....	04/08/51	Enewetak.
Easy .....	04/21/51	Enewetak.
George .....	05/09/51	Enewetak.
Item .....	05/25/51	Enewetak.

(6) For Operation Buster-Jangle, the period October 22, 1951 through December 20, 1951:

Able .....	10/22/51	NTS.
Baker .....	10/28/51	NTS.
Charlie .....	10/30/51	NTS.
Dog .....	11/01/51	NTS.
Sugar .....	11/19/51	NTS.
Uncle .....	11/29/51	NTS.

(7) For Operation Tumbler-Snapper, the period April 1, 1952 through June 20, 1952:

Able .....	04/01/52	NTS.
Baker .....	04/15/52	NTS.
Charlie .....	04/22/52	NTS.
Dog .....	05/01/52	NTS.
Easy .....	05/07/52	NTS.
Fox .....	05/25/52	NTS.
George .....	06/01/52	NTS.

(8) For Operation Ivy, the period of October 29, 1952 through December 31, 1952:

Mike .....	11/01/52	Enewetak.
King .....	11/16/52	Enewetak.

(9) For Operation Upshot-Knothole, the period March 17, 1953 through June 20, 1953:

Annie .....	03/17/53	NTS.
Nancy .....	03/24/53	NTS.
Ruth .....	03/31/53	NTS.
Dixie .....	04/06/53	NTS.
Ray .....	04/11/53	NTS.
Badger .....	04/18/53	NTS.
Simon .....	04/25/53	NTS.
Encore .....	05/08/53	NTS.
Harry .....	05/19/53	NTS.
Grable .....	05/25/53	NTS.
Climax .....	06/04/53	NTS.

(10) For Operation Castle, the period February 27, 1954 through May 31, 1954:

Bravo .....	03/01/54	Bikini.
Romeo .....	03/27/54	Bikini.
Koon .....	04/07/54	Bikini.
Union .....	04/26/54	Bikini.
Yankee .....	05/05/54	Bikini.
Nectar .....	05/14/54	Enewetak.

(11) For Operation Teapot, the period February 18, 1955 through June 10, 1955:

Wasp .....	02/18/55	NTS.
Moth .....	02/22/55	NTS.
Tesla .....	03/01/55	NTS.
Turk .....	03/07/55	NTS.
Hornet .....	03/12/55	NTS.
Bee .....	03/22/55	NTS.
Ess .....	03/23/55	NTS.
Apple-1 .....	03/29/55	NTS.
Wasp Prime .....	03/29/55	NTS.
Ha .....	04/06/55	NTS.
Post .....	04/09/55	NTS.
Met .....	04/15/55	NTS.
Apple-2 .....	05/05/55	NTS.
Zucchini .....	05/15/55	NTS.

(12) For Operation Wigwam, the period May 14, 1955 through May 15, 1955:



Wigwam..... 05/14/55 Pacific.

(13) For Operation Redwing, the period May 2, 1956 through August 6, 1956, for all activities other than service as a member of the garrison or maintenance forces on the atoll of Enewetak from August 7, 1956, through August 7, 1957; the period of atmospheric nuclear testing for service as a member of the garrison or maintenance forces on the atoll of Enewetak shall run from May 2, 1958, through August 7, 1957:

Lacrosse .....	05/05/56	Enewetak.
Cherokee .....	05/21/56	Bikini.
Zuni .....	05/28/56	Bikini.
Yuma .....	05/28/56	Enewetak.
Erie .....	05/31/56	Enewetak.
Seminole .....	06/06/56	Enewetak.
Flathead .....	06/12/56	Bikini.
Blackfoot .....	06/12/56	Enewetak.
Kickapoo .....	06/14/56	Enewetak.
Osage .....	06/16/56	Enewetak.
Inca .....	06/22/56	Enewetak.
Dakota .....	06/26/56	Bikini.
Mohawk .....	07/03/56	Enewetak.
Apache .....	07/09/56	Enewetak.
Navajo .....	07/11/56	Bikini.
Tewa .....	07/21/56	Bikini.
Huron .....	07/22/56	Enewetak.

(14) For Operation Plumbbob, the period May 28, 1957 through October 22, 1957:

Boltzmann .....	05/28/57	NTS.
Franklin .....	06/02/57	NTS.
Lassen .....	06/05/57	NTS.
Wilson .....	06/18/57	NTS.
Priscilla .....	06/24/57	NTS.
Hood .....	07/05/57	NTS.
Diablo .....	07/15/57	NTS.
John .....	07/19/57	NTS.
Kepler .....	07/24/57	NTS.
Owens .....	07/25/57	NTS.
Stokes .....	08/07/57	NTS.
Shasta .....	08/18/57	NTS.
Doppler .....	08/23/57	NTS.
Franklin Prime .....	08/30/57	NTS.
Smoky .....	08/31/57	NTS.
Galileo .....	09/02/57	NTS.
Wheeler .....	09/06/57	NTS.
Laplace .....	09/08/57	NTS.
Fizeau .....	09/14/57	NTS.
Newton .....	09/16/57	NTS.
Whitney .....	09/23/57	NTS.
Charleston .....	09/28/57	NTS.
Morgan .....	10/07/57	NTS.

(15) For Operation Hardtack I, the period April 26, 1958 through October 31, 1958, for all activities other than service as a member of the garrison or maintenance forces on the atoll of Enewetak from November 1, 1958, through April 30, 1959; the period of atmospheric nuclear testing for service as a member of the garrison of maintenance forces on the atoll of Enewetak shall run from April 26, 1958, through April 30, 1959:

Yucca .....	04/28/58	Pacific.
Cactus .....	05/06/58	Enewetak.
Fir .....	05/12/58	Bikini.
Butternut .....	05/12/58	Enewetak.
Koa .....	05/13/58	Enewetak.
Wahoo .....	05/16/58	Enewetak.
Holly .....	05/21/58	Enewetak.
Nutmeg .....	05/22/58	Bikini.
Yellowwood .....	05/26/58	Enewetak.
Magnolia .....	05/27/58	Enewetak.
Tobacco .....	05/30/58	Enewetak.
Sycamore .....	05/31/58	Bikini.
Rose .....	06/03/58	Enewetak.
Umbrella .....	06/09/58	Enewetak.
Maple .....	06/11/58	Bikini.
Aspen .....	06/15/58	Bikini.
Walnut .....	06/15/58	Enewetak.
Linden .....	06/18/58	Enewetak.
Redwood .....	06/28/58	Bikini.
Elder .....	06/28/58	Enewetak.
Oak .....	06/29/58	Enewetak.
Hickory .....	06/29/58	Bikini.
Sequoia .....	07/02/58	Enewetak.
Cedar .....	07/03/58	Bikini.
Dogwood .....	07/06/58	Enewetak.
Poplar .....	07/12/58	Bikini.
Scaevola .....	07/14/58	Enewetak.
Pisonia .....	07/18/58	Enewetak.
Juniper .....	07/22/58	Bikini.
Olive .....	07/23/58	Enewetak.
Pine .....	07/27/58	Enewetak.
Teak .....	07/31/58	Johnston Isl.
Cunice .....	08/06/58	Enewetak.
Orange .....	08/11/58	Johnston Isl.
Fig .....	08/18/58	Enewetak.

(16) For Operation Argus, the period August 25, 1958 through September 10, 1958:

Argus I .....	08/27/58	South Atlantic.
Argus II .....	08/30/58	South Atlantic.
Argus III .....	09/06/58	South Atlantic.

(17) For Operation Hardtack II, the period September 19, 1958 through October 31, 1958:

Eddy .....	09/19/58	NTS.
Mora .....	09/29/58	NTS.
Quay .....	10/10/58	NTS.
Lea .....	10/13/58	NTS.
Hamilton .....	10/15/58	NTS.
Dona Ana .....	10/16/58	NTS.
Rio Arriba .....	10/18/58	NTS.
Socorro .....	10/22/58	NTS.
Wrangell .....	10/22/58	NTS.
Rushmore .....	10/22/58	NTS.
Sanford .....	10/26/58	NTS.
De Baca .....	10/26/58	NTS.
Humboldt .....	10/29/58	NTS.
Mazama .....	10/29/58	NTS.
Sante Fe .....	10/30/58	NTS.

(18) For Operation Dominic I, the period April 23, 1962 through December 31, 1962:

Adobe .....	04/25/62	Christmas Isl.
Aztec .....	04/27/62	Christmas Isl.
Arkansas .....	05/02/62	Christmas Isl.
Questa .....	05/04/62	Christmas Isl.
Frigate Bird .....	05/06/62	Pacific.
Yukon .....	05/09/62	Christmas Isl.
Mesilla .....	05/09/62	Christmas Isl.
Muskegon .....	05/11/62	Christmas Isl.

Swordfish .....	05/11/62	Pacific.
Encino .....	05/12/62	Christmas Isl.
Swanee .....	05/14/62	Christmas Isl.
Chetco .....	05/19/62	Christmas Isl.
Tanana .....	05/25/62	Christmas Isl.
Nambe .....	05/27/62	Christmas Isl.
Alma .....	06/08/62	Christmas Isl.
Truckee .....	06/09/62	Christmas Isl.
Yeso .....	06/10/62	Christmas Isl.
Harlem .....	06/12/62	Christmas Isl.
Rinconada .....	06/15/62	Christmas Isl.
Dulce .....	06/17/62	Christmas Isl.
Petit .....	06/19/62	Christmas Isl.
Otowi .....	06/22/62	Christmas Isl.
Bighorn .....	06/27/62	Christmas Isl.
Bluestone .....	06/30/62	Christmas Isl.
Starfish .....	07/08/62	Johnston Isl.
Sunset .....	07/10/62	Christmas Isl.
Pamlico .....	07/11/62	Christmas Isl.
Androscoggin .....	10/02/62	Johnston Isl.
Bumping .....	10/06/62	Johnston Isl.
Chama .....	10/18/62	Johnston Isl.
Checkmate .....	10/19/62	Johnston Isl.
Bluegill .....	10/25/62	Johnston Isl.
Calamity .....	10/27/62	Johnston Isl.
Housatonic .....	10/30/62	Johnston Isl.
Kingfish .....	11/01/62	Johnston Isl.
Tightrope .....	11/03/62	Johnston Isl.

(19) For Operation Dominic II, the period July 7, 1962 through August 15, 1962:

Little Feller II .....	07/07/62	NTS.
Johnie Boy .....	07/11/62	NTS.
Small Boy .....	07/14/62	NTS.
Little Feller I .....	07/17/62	NTS.

(20) For Operation Plowshare, the period of July 6, 1962, through July 7, 1962, covering Project Sedan;

#### § 79.42 Eligibility criteria.

To establish eligibility for compensation under this subpart, a claimant or eligible surviving beneficiary must show, by a preponderance of the evidence, that each of the following criteria are satisfied:

(a) The claimant was present onsite at any time during a period of atmospheric nuclear testing;

(b) The claimant was a participant during that period in the atmospheric detonation of a nuclear device; and

(c) The claimant contracted one (or more) of the specified compensable diseases listed in § 79.22(b).

#### § 79.43 Proof of participation onsite during a period of atmospheric nuclear testing.

(a) Claimants associated with the Department of Defense (DoD) Components or DoD contractors.

(1) A claimant or eligible surviving beneficiary who alleges that the claimant was present onsite during a period of atmospheric nuclear testing as a member of the armed forces or an employee or contractor employee of the DoD, or any of its components or



agencies, must submit the following information on the claim form:

- (i) Claimant's name;
- (ii) Claimant's military service number;
- (iii) Claimant's social security number;
- (iv) The site at which the claimant participated in an atmospheric nuclear test;

(v) The name or number of the claimant's military organization or unit assignment at the time of his/her participation onsite;

(vi) The dates of the claimant's assignment onsite;

(vii) As full and complete a description as possible of the claimant's official duties, responsibilities and activities while an onsite participant.

(2) A claimant or eligible surviving beneficiary under this section need not submit any additional documentation of onsite participation during an atmospheric nuclear test at the time the claim is filed; however, additional documentation may be required as set forth in paragraph (a)(3).

(3) Upon receipt of a claim under this subpart that contains the information set forth in paragraph (a)(1), the Radiation Exposure Compensation Unit will forward the information to the Defense Nuclear Agency (DNA) of the DoD and request that the DNA conduct a search of its records for the purpose of gathering facts relating to the claimant's presence onsite and participation in an atmospheric nuclear test. If the facts gathered by the DNA are insufficient to establish the eligibility criteria in section 79.42 of these regulations, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity to submit military, government, or business records in accordance with the procedure set forth in § 79.52(c).

(b) Claimants associated with AEC and Department of Energy (DOE) Components or Contractors or members of the Federal Civil Defense Administration and the Office of Civil and Defense Mobilization.

(1) A claimant or eligible surviving beneficiary who alleges that the claimant was present onsite during an atmospheric nuclear test as an employee of the AEC, the DOE, or any of their components, agencies or offices, or as an employee of a contractor of the AEC, or DOE, or as a member of the Federal Civil Defense or the Office of Civil and Defense Mobilization must submit the following information on the claim form:

- (i) Claimant's name;
- (ii) Claimant's social security number;
- (iii) The site at which the claimant participated in an atmospheric nuclear test;

(iv) The name or other identifying information associated with the claimant's organization, unit, assignment or employer at the time of their participation onsite;

(v) The dates of the claimant's assignment onsite;

(vi) As full and complete a description as possible of the claimant's official duties, responsibilities and activities while an onsite participant.

(2) A claimant or eligible surviving beneficiary under this section need not submit any additional documentation of presence onsite during an atmospheric nuclear test at the time the claim is filed; however, additional documentation may be required as set forth in paragraph (b)(3) of this section.

(3) Upon receipt of a claim under this subpart that contains the information set forth in paragraph (b)(1) of this section, the Radiation Exposure Compensation Unit will forward the information to the Nevada Field Office of the Department of Energy (DOE/NV) and request that the DOE conduct a search of its records for the purpose of gathering facts relating to the claimant's presence onsite and participation in an atmospheric nuclear test. If the facts gathered by the DOE/NV are insufficient to establish the eligibility criteria in § 79.42 of these regulations, the claimant or eligible surviving beneficiary will be notified and afforded the opportunity to submit military, government, or business records in accordance with the procedure set forth in § 79.52(c).

#### § 79.44 Proof of medical condition.

Proof of medical condition under this Subpart will be made in the same manner, and according to the same procedures and limitations, as are set forth in the provisions of § 79.16 and § 79.26.

**§ 79.45 Proof of initial or first exposure after age 20 for the condition listed in § 79.22(b)(1), or before age 20 for the condition listed in § 79.22(b)(4), or before age 40 for the condition listed in § 79.22(b)(5), or before age 30 for the condition listed in § 79.22(b)(7).**

(a) Proof of the claimant's date of birth must be established in accordance with the provisions of § 79.14(a).

(b) Absent any indication to the contrary, the earliest date of onsite participation indicated on any records accepted by the Radiation Exposure Compensation Unit as proof of the claimant's onsite participation will be presumed to be the date of initial or first exposure.

#### § 79.46 Proof of onset of leukemia between two and thirty years after first exposure, and proof of onset of a specified compensable disease more than five years after first exposure.

Absent any indication to the contrary, the earliest date of onsite participation indicated on any records accepted by the Radiation Exposure Compensation Unit as proof of the claimant's onsite participation will be presumed to be the date of first or initial exposure. The date of onset will be the date of diagnosis as indicated on the medical documentation accepted by the Radiation Exposure Compensation Unit as proof of the specified compensable disease. Proof of the onset of leukemia shall be established in accordance with § 79.11(e).

#### § 79.47 Proof of no heavy smoking, no heavy drinking, no heavy coffee drinking, and no indication of disease.

Proof of the claimant's smoking, drinking, and coffee drinking, and the existence of an indication of disease under this Subpart must be established in accordance with the provisions of § 79.27.

### Subpart F—Procedures

#### § 79.50 Attorney General's delegation of authority.

(a) An Assistant Director within the Constitutional and Specialized Tort Staff, Torts Branch, Civil Division, shall be assigned to manage the Radiation Exposure Compensation Program and issue a decision on each claim filed under the Act, and otherwise act on behalf of the Attorney General in all other matters relating to the administration of the Program.

(b) The Assistant Attorney General, Civil Division, or the official designated by him to act on his behalf (the Appeals Officer), shall act on appeals from the Assistant Director's decisions.

#### § 79.51 Filing of claims.

(a) All claims for compensation under the Act must be in writing and submitted on a standard form designated by the Assistant Director for the filing of compensation claims. Except as specifically provided in these regulations, the claimant or eligible surviving beneficiary must furnish the written medical documentation required by these regulations with his/her standard form. Except as specifically provided in these regulations, the claimant or eligible surviving beneficiary must also provide with the standard form records establishing his/her physical presence in an affected area, employment in an uranium mine,



or onsite participation, in accordance with these regulations. The standard form must be completed, signed under oath either by a person eligible to file a claim under the Act or by that person's legal guardian, and mailed with supporting documentation to the following address: Radiation Exposure Compensation Program, U.S. Department of Justice, P.O. Box 146, Ben Franklin Station, Washington, DC 20044-0146.

Copies of the standard form, as well as the regulations, guidelines and other information may be obtained by requesting the document or publications from the Assistant Director at the address indicated above.

(b) A claim will be filed after receipt of the standard form with supporting documentation and examination for substantial compliance with these regulations. The date of filing shall be recorded by a stamp on the face of the standard form. The Assistant Director shall only file claims which substantially comply with § 79.51(a) of these regulations. Claims which substantially fail to comply with the aforementioned section shall be promptly returned unfiled to the sender with a statement identifying the reasons why the claim does not comply with the regulations. The sender may return the claim to the Assistant Director after correcting the deficiencies. For those cases that are filed, the Assistant Director shall promptly acknowledge receipt of the claim with a letter identifying the number assigned to the claim, the date the claim was filed, and the period within which the Assistant Director must act on the claim.

(c) The following persons or their legal guardians are eligible to file claims for compensation under the Act in the order listed below:

- (1) The claimant;
- (2) If the claimant is deceased, the spouse of the claimant;
- (3) If there is no surviving spouse, a child of the claimant;
- (4) If there is no surviving spouse or child, a parent of the claimant;
- (5) If there is no surviving spouse, child or parent, a grandchild of the claimant; or
- (6) If there is no surviving spouse, child, parent or grandchild, a grandparent of the claimant.

(d) The identity of the claimant must be established by submitting a birth certificate, or one of the documents identified in § 79.14(a) of these regulations when the person has no birth certificate.

(e) The spouse of a claimant must establish his/her eligibility to file a claim by furnishing:

- (1) His/her birth certificate;
- (2) The birth and death certificates of the claimant;
- (3) One of the following documents to establish a marriage to the claimant:
  - (i) The public record of marriage;
  - (ii) A certificate of marriage;
  - (iii) The religious record of marriage;
- or
- (iv) A judicial or other governmental determination that a valid marriage existed, such as the final opinion or order of a probate court or a determination of the Social Security Administration that the claimant is the spouse of the decedent; and
- (4) An affidavit (or declaration under oath on the standard claim form) stating that the spouse was married to the claimant for at least one year immediately prior to the claimant's death.
- (5) If the spouse is a member of an Indian Tribe, he/she need not provide any of the documents listed above at the time the claim is filed (although these records may later be required), but instead should furnish a signed release of private information which will be used by the Assistant Director to obtain a statement of verification of all of the information listed above directly from the tribal records custodian.
- (f) A child of a claimant must establish his/her eligibility to file a claim by furnishing:
  - (1) His/her birth certificate;
  - (2) The birth and death certificates of the claimant;
  - (3) One of the documents listed in paragraph (e)(3) of this section to establish each marriage to the claimant (if applicable);
  - (4) A death certificate or divorce decree for each spouse of the claimant (if applicable);
  - (5) A death certificate for each of the other children of the claimant (if applicable);
  - (6) An affidavit (or declaration under oath on the standard claim form) stating the following:
    - (i) That the claimant was never married, or, if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant; and
    - (ii) That the claimant had no other children, or, if the claimant did have other children, the name of each child, the date and place of birth of each child, and the date and place of death or current address of each child; and
  - (7) One of the following:
    - (i) In the case of a natural child, a birth certificate showing that the claimant was the child's parent, or a

judicial decree identifying the claimant as the child's parent;

(ii) In the case of an adopted child, the judicial decree of adoption;

(iii) In the case of a step child, evidence of birth to the spouse of the claimant as outlined above, and records which reflect that the step child lived with the claimant in a regular parent-child relationship.

(8) If the child is a member of an Indian Tribe, he/she need not provide any of the documents listed above at the time the claim is filed (although these records may later be required), but instead should furnish a signed release of private information which will be used by the Assistant Director to obtain a statement of verification of all of the information listed above from the tribal records custodian.

(g) A parent of a claimant must establish his/her eligibility to file a claim by furnishing:

- (1) His/her birth certificate;
- (2) The birth and death certificates of the claimant;
- (3) One of the documents listed in paragraph (e)(3) of this section to establish each marriage to the claimant (if applicable);
- (4) A death certificate or divorce decree for each spouse of the claimant (if applicable);
- (5) A death certificate for each child of the claimant (if applicable);
- (6) A death certificate for the other parent(s) (if applicable);
- (7) An affidavit (or declaration under oath on the standard claim form) stating the following:
  - (i) That the claimant was never married, or, if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant; and
  - (ii) That the claimant had no children, or, if the claimant did have children, the name of each child, the date and place of birth of each child, and the date and place of death of each child;
  - (iii) The name and address, or date and place of death, of the other parent(s) of the claimant; and
- (8) One of the following: (i) In the case of a natural parent, a birth certificate showing that the claimant was the parent's child, or a judicial decree identifying the claimant as the parent's child;
- (ii) In the case of an adoptive parent, the judicial decree of adoption;
- (9) If the parent is a member of an Indian Tribe, he/she need not provide any of the documents listed above at the time the claim is filed (although these



records may later be required), but instead should furnish a signed release of private information which will be used by the Assistant Director to obtain a statement of verification of all of the information listed above from the tribal records custodian.

(h) A grandchild of a claimant must establish his/her eligibility to file a claim by furnishing:

- (1) His/her birth certificate;
- (2) The birth and death certificates of the claimant;

(3) One of the documents listed in paragraph (e)(3) of this section to establish each marriage to the claimant (if applicable);

(4) A death certificate or divorce decree for each spouse of the claimant (if applicable);

(5) A death certificate for each child of the claimant;

(6) A death certificate for each parent of the claimant;

(7) A death certificate for each of the other grandchildren of the claimant (if applicable);

(8) An affidavit (or declaration under oath on the standard claim form) stating the following:

(i) That the claimant was never married, or, if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant;

(ii) The name of each child, the date and place of birth of each child, and the date and place of death of each child;

(iii) The names of each parent of the claimant together with the dates and places of death of each parent; and

(iv) That the claimant had no other grandchildren, or, if the claimant did have other grandchildren, the name of each grandchild, the date and place of birth of each grandchild, and the date and place of death or current address of each child; and

(9) One of the following:

(i) In the case of a natural grandchild, a combination of birth certificates showing that the claimant was the grandchild's grandparent;

(ii) In the case of an adopted grandchild, a combination of judicial records and birth certificates showing that the claimant was the grandchild's grandparent;

(iii) In the case of a step grandchild, evidence of birth to the spouse of the child of the claimant, as outlined above, and records which reflect that the step child lived with a child of the claimant in a regular parent-child relationship;

(10) If the grandchild is a member of an Indian Tribe, he/she need not provide any of the documents listed above at the time the claim is filed

(although these records may later be required), but instead should furnish a signed release of private information which will be used by the Assistant Director to obtain a statement of verification of all of the information listed above from the tribal records custodian.

(i) A grandparent of the claimant must establish his/her eligibility to file a claim by furnishing:

(1) His/her birth certificate;

(2) The birth and death certificates of the claimant;

(3) One of the documents listed in subsection (e)(3) above to establish each marriage to the claimant (if applicable);

(4) A death certificate or divorce decree for each spouse of the claimant (if applicable);

(5) A death certificate for each child of the claimant (if applicable);

(6) A death certificate for each parent of the claimant;

(7) A death certificate for each grandchild of the claimant (if applicable);

(8) A death certificate for each of the other grandparents of the claimant (if applicable);

(9) An affidavit stating the following:

(i) That the claimant was never married, or if the claimant was ever married, the name of each spouse, the date each marriage began and ended, and the date and place of divorce or death of the last spouse of the claimant;

(ii) That the claimant had no children, or, if the claimant did have children, the name of each child, the date and place of birth of each child, and the date and place of death of each child;

(iii) The names of each parent of the claimant together with the dates and places of death of each parent;

(iv) That the claimant had no grandchildren, or, if the claimant did have grandchildren, the name of each grandchild, the date and place of birth of each grandchild, and the date and place of death of each grandchild; and

(v) The names of all other grandparents of the claimant together with the dates and places of birth of each grandparent, and the dates and places of death of each other grandparent or the current address of each other grandparent; and

(10) One of the following:

(i) In the case of a natural grandparent, a combination of birth certificates showing that the claimant was the grandparent's grandchild;

(ii) In the case of an adoptive grandparent, a combination of judicial records showing that the claimant was the grandparent's grandchild;

(11) If the grandchild is a member of an Indian Tribe, he/she need not

provide any of the documents listed above at the time the claim is filed (although these records may later be required), but instead should furnish a signed release of private information which will be used by the Assistant Director to obtain a statement of verification of all of the information listed above from the tribal records custodian.

(j) A claim that was filed and denied may be filed again in those cases where the claimant or eligible surviving beneficiary obtains documentation he/she did not possess when the claim was previously filed that establishes:

- (1) An injury specified in the Act,
- (2) Residency in the affected area,
- (3) Onsite participation in a nuclear test, or

(4) Exposure to a defined minimum level of radiation in a uranium mine or mines during a designated time period.

However, a claimant or eligible surviving beneficiary may not file a claim more than three times.

#### § 79.52 Review and resolution of claims.

(a) *Initial review.* The Assistant Director shall conduct an initial review of each claim that has been filed to determine whether:

(1) The person submitting the claim appears to be an eligible surviving beneficiary, in those cases where the claimant is deceased;

(2) The medical condition identified in the claim is a disease specified in the Act for which the claimant or eligible surviving beneficiary could recover compensation;

(3) For claims submitted under subparts B and C of this part, the period or place of physical presence set forth in the claim falls within the designated time period or affected areas identified in section 79.11;

(4) For claims submitted under subpart D of this part, the period or place of uranium mining set forth in the claim falls within the designated time period or specified states identified in § 79.31;

(5) For claims submitted under subpart E, the place and period of onsite participation set forth in the claim falls within the places and times set forth in §§ 79.41 (c) and (f).

If the Assistant Director determines from the initial review that any one of the applicable criteria is not met, or that any other criteria of the regulations is not met, she shall so advise the claimant or eligible surviving beneficiary in writing setting forth the reasons for his determination and provide the claimant or eligible surviving beneficiary sixty days from the date of his letter to



correct the deficiency. If the claimant or eligible surviving beneficiary fails to adequately correct the deficiency within the sixty day period, the Assistant Director shall issue a Decision denying the claim without further review.

(b) *Review of written medical documentation.* If necessary, the Assistant Director will examine the written medical documentation submitted in support of the claim and determine whether it meets the requirements of the regulations and satisfies the criteria for eligibility established by the Act and the regulations. The Assistant Director may, for the purposes of verifying such eligibility, require the claimant or eligible surviving beneficiary to provide an authorization to release any medical record identified in these regulations. If the Assistant Director determines that the documentation does not meet the requirements of the regulations, or does not satisfy the criteria for eligibility established by the Act and the regulations, he shall so advise the claimant or eligible beneficiary in writing setting forth the reasons for his determination and provide the claimant or eligible beneficiary sixty days from the date of his letter, or such greater period as he permits, to furnish additional written medical documentation which meets the requirements of the Act and the regulations. Where appropriate, the Assistant Director may require the claimant or eligible beneficiary to provide an authorization to release additional records as an alternative to, or in addition to, the claimant furnishing such additional records. If the claimant or eligible beneficiary fails to provide sufficient written medical documentation, or a valid release when requested by the Assistant Director, within sixty days, or the greater period approved by the Assistant Director, then the Assistant Director shall issue a Decision denying the claim without further review.

(c) *Review of the records.* If necessary, the Assistant Director will examine the other records submitted in support of the claim to prove those matters set forth in all other sections of the Act and the regulations, and determine whether such records meet the requirements of the regulations satisfy all other criteria for eligibility established by the statute and the regulations. The Assistant Director may, for the purposes of verifying such eligibility, require the claimant or eligible surviving beneficiary to provide an authorization to release any record identified in these regulations. If the

Assistant Director determines that the records do not meet the requirements of the regulations, or does not satisfy the criteria for eligibility established by the Act and the regulations, he shall so advise the claimant or eligible surviving beneficiary in writing setting forth the reasons for his determination and provide the claimant or eligible surviving beneficiary sixty days from the date of this letter, or such greater period as he permits, to furnish additional records which meet the requirements of the Act and the regulations. Where appropriate, the Assistant Director may require the claimant or eligible surviving beneficiary to provide an authorization to release additional records as an alternative to, or in addition to, the claimant or eligible beneficiary furnishing such additional records. If the claimant or eligible beneficiary fails to provide sufficient records, or a valid release when requested by the Assistant Director, within sixty days, or the greater period approved by the Assistant Director, then the Assistant Director shall issue a Decision denying the claim without further review.

(d) *Decision.* The Assistant Director shall review each claim and issue a written decision on each claim within twelve months of the date the claim was filed. Any decision denying a claim shall set forth reasons for denial and also indicate that the decision of the Assistant Director may be appealed to the Assistant Attorney General, Civil Division, in writing within sixty days from the date of the decision, or such greater period as may be permitted by the Assistant Director, and identify the address to written appeal should be sent.

#### § 79.53 Appeals procedures.

(a) An appeal must be in writing, and must be received by the Radiation Exposure Compensation Unit within sixty days of the date of the decision denying the claim. Appeals must be sent to the following address: Radiation Exposure Compensation Program, Appeal of Decision, U.S. Department of Justice, P.O. Box 146, Ben Franklin Station, Washington, DC 20044-0146.

(b) The claimant or eligible surviving beneficiary may set forth in the appeal the reason why he/she believes that the decision of the Assistant Director is incorrect, but may not submit new written medical documentation or other records to the Assistant Attorney General that were not provided to the Assistant Director before he issued his decision.

(c) Upon receipt of an appeal, the Radiation Exposure Compensation Unit

shall forward the appeal, the decision, the claim and all supporting documentation to the Assistant Attorney General, of the Appeals Officer if one is designated, for action on the appeal. If the claim was not received within the sixty day period, the appeal may be denied without further review.

(d) The Assistant Attorney General or Appeals Officer shall review the appeal and other information forwarded by the Unit. After such review, the Assistant Attorney General or Appeals Officer shall issue a Memorandum which shall either affirm or reverse the Assistant Director's decision, or when appropriate, remand the claim to the Assistant Director for further action, and shall include a statement of the reasons for such reversal, affirmance, or remand. The Memorandum and all papers relating to the claim shall be returned to the Radiation Exposure Compensation Unit which shall promptly inform the claimant or eligible surviving beneficiary of the action of the Assistant Attorney General or Appeals Officer. A Memorandum affirming or reversing the Assistant Director's decision shall be deemed to be the final action of the Department of Justice on the claim.

#### § 79.54 Attorneys

(a) A claimant or eligible beneficiary need not be represented by an attorney to file a claim under the Act or receive payment under the Program. To the extent permitted by the resources available to administer the Program, the Assistant Director may provide assistance through the Radiation Exposure Compensation Unit to all persons who file claims for compensation under the Act, or may establish a priority of assistance.

(b) If the claimant or eligible surviving beneficiary desires to be represented, then the attorney selected by the claimant or eligible surviving beneficiary shall file with the Assistant Director a written statement that he/she is a member in good standing of the bar of the highest court of a state, and is authorized to represent the particular person on whose behalf he/she acts.

(c) The total compensation payable to the attorney by the claimant or eligible surviving beneficiary may not exceed ten percent of the amount of the payment to that person.

#### § 79.55 Procedures for payment of claims.

(a) Payment shall be made to the claimant, or to the legal guardian of the claimant, unless the claimant is deceased at the time of the payment. In cases involving a claimant who is



deceased, payment shall be made to an eligible surviving beneficiary, or to the legal guardian acting on behalf of the eligible surviving beneficiary, in accordance with the terms and conditions specified in section 6(c)(4)(A) of the Act.

(b) In cases involving the approval of a claim, the Assistant Director shall take all necessary and appropriate steps to determine the correct amount of any offset to be made to the amount awarded under the Act, and to verify the identity of the claimant or the existence of eligible surviving beneficiaries who are entitled by the Act to receive the payment the claimant would have received. The Assistant Director may conduct any investigation, require any claimant or eligible surviving beneficiary to provide or execute any affidavit, record, or document, or authorize the release of any information as the Assistant Director deems necessary to ensure that the compensation payment is made in the correct amount and to the correct person(s). If the claimant or eligible surviving beneficiary fails or refuses to execute an affidavit or release of information, or provide a record or document requested, or fails to provide access to information, such failure or refusal may be deemed to be a rejection of the payment, unless the claimant or eligible surviving beneficiary of the claimant does not have and cannot obtain the legal authority to provide, release, or authorize access to the required information, records, or documents.

(c) Prior to authorizing payment, the Assistant Director shall require the claimant or each eligible surviving beneficiary of a claim filed under subparts B, C, or D of these regulations to execute and provide an affidavit (or declaration under oath on the standard claim form) setting forth the amount of any payment made pursuant to a final award or settlement a claim (other than a claim for worker's compensation), against any person, that is based on injuries incurred by the claimant for which his/her claim under the Radiation Exposure Compensation Act was submitted. For purposes of this subsection, a "claim" includes, but is not limited to, any request or demand for money made or sought in a civil action, or made or sought in anticipation of the filing of a civil action, but shall not include requests or demands made pursuant to a life insurance or health insurance contract. If any such award or settlement payment was made, the Assistant Director shall subtract the sum of such award or settlement

payments from the payment to be made under the Act.

(d) In the case of a claim filed under subpart E of this part, the Assistant Director shall require the claimant or each eligible surviving beneficiary to execute and provide an affidavit (or declaration under oath on the standard claim form) setting forth the amount of any payment made pursuant to a final award or settlement on a claim against any person, or any payment by the Federal Government, that is based on injuries incurred by the claimant for which his/her claim under the Radiation Exposure Compensation Act was submitted. For purposes of this subsection, a "claim" includes, but is not limited to, any request or demand for money made or sought in a civil action, or made or sought in anticipation of a civil action, but shall not include requests or demands made pursuant to a life or health insurance contract.

(1) Payments by the Federal Government shall include:

(i) Any disability payments of compensation benefits paid to the claimant and his/her dependents while the claimant is alive; and  
(ii) Any Social Security payments of Dependency and Indemnity Compensation payments made to survivors due to death related to the illness for which the claim under the Act is submitted.

(2) Payments by the Federal Government shall not include:

(i) Active duty pay, retired pay, retainer pay, or payments under the Survivor Benefits Plan;  
(ii) Death gratuity;  
(iii) SGLI, VGLI, or mortgage, life or health insurance payments;  
(iv) Burial benefits or reimbursement for burial expenses;  
(v) Loans or loan guarantees;  
(vi) Education benefits and payments;  
(vii) Vocational rehabilitation benefits and payments;  
(viii) Medical, hospital and dental benefits; or  
(ix) Commissary and PX privileges.

(3) If any such award, settlement or Federal payment was made, the Assistant Director shall calculate the actuarial present value of such payments, and subtract the actuarial present value from the payment to be made under the Act. The actuarial present value shall be calculated using the worksheet attached as appendix C of this part in the following manner:

(i) *Step 1.* Enter the sum of the past payments received in each year in the appropriate rows in column (2). Additional rows will be added as needed to calculate present value of

payments received in the years prior to 1960 and after 1990.

(ii) *Step 2.* Enter the present CPI-U (to be obtained monthly from the Bureau of Labor Statistics, Department of Labor) in column (3).

(iii) *Step 3.* Enter the CPI (Major Expenditure Classes—All Items) for each year in which payments were received in the appropriate row in column (4). (These measures are provided for 1960 through 1990. The measures for subsequent years will be obtained from the Bureau of Labor Statistics.)

(iv) *Step 4.* For each row, multiply the amount in column (2) by the corresponding inflator (column (3) divided by column (4)) and enter the product in column (5).

(v) *Step 5.* Add the products in column (5) and enter the sum on the line labelled "Total of column (5) equals actuarial present value of past payments."

(vi) *Step 6.* Subtract the total in Step 5 from the statutory payment of \$75,000 and enter the remainder on the line labelled "Net Claim Owed To Claimant."

(e) When the Assistant Director has verified the identity of the claimant or each eligible surviving beneficiary who is entitled to the compensation payment, or to a share of the compensation payment, and determined the correct amount of the payment or the share of the payment, he shall notify the claimant or each eligible surviving beneficiary, or his/her legal guardian, and require such person(s) to sign an Acceptance of Payment Form. Such form shall be signed and returned within sixty days of the date of the form or such greater period as may be allowed by the Assistant Director. Failure to return the signed form within the required time may be deemed to be a rejection of the payment. Signing and returning the form within the required time shall constitute acceptance of the payment, unless the individual who has signed the form dies prior to receiving the actual payment, in which case the person who possesses the payment shall return it to the Assistant Director for redetermination of the correct disbursement of the payment.

(f) Rejected compensation payments, or shares of compensation payments, shall not be distributed to other eligible surviving beneficiaries, but shall be returned to the Trust Fund for use in paying other claims.

(g) Upon receipt of the Acceptance of Payment Form, the Assistant Director and the Director or Deputy Director of the Constitutional and Specialized Tort



Staff, Torts Branch, Civil Division, shall authorize the appropriate authorities to issue a check to the claimant or each surviving eligible beneficiary who has accepted payment out of the funds appropriated for this purpose.

(h) Multiple payments:

(1) No claimant may receive payment under more than one Subpart of these regulations for illnesses he/she contracted. In addition to one payment for his/her illnesses, he/she may also receive one payment for each claimant

for whom he/she qualifies as an eligible surviving beneficiary.

(2) An eligible surviving beneficiary, who is not also a claimant, may receive one payment for each claimant for whom he/she qualifies as an eligible surviving beneficiary.

#### Appendix A to Part 79—Pulmonary Function Tables

TABLE 1: MALES FVC—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 35 to 53									
	35	37	39	41	43	45	47	49	51	53
56.0	1.64	1.59	1.55	1.50	1.46	1.41	1.37	1.32	1.28	1.23
56.5	1.72	1.67	1.63	1.58	1.54	1.49	1.45	1.40	1.36	1.31
57.0	1.80	1.75	1.71	1.66	1.62	1.57	1.53	1.48	1.44	1.39
57.5	1.88	1.83	1.79	1.74	1.70	1.65	1.61	1.56	1.52	1.47
58.0	1.96	1.91	1.87	1.82	1.78	1.73	1.69	1.64	1.60	1.55
58.5	2.04	1.99	1.95	1.90	1.86	1.81	1.77	1.72	1.68	1.63
59.0	2.12	2.07	2.03	1.98	1.94	1.89	1.85	1.80	1.76	1.72
59.5	2.20	2.15	2.11	2.06	2.02	1.97	1.93	1.89	1.84	1.80
60.0	2.28	2.23	2.19	2.14	2.10	2.05	2.01	1.97	1.92	1.88
60.5	2.36	2.31	2.27	2.22	2.18	2.14	2.09	2.05	2.00	1.96
61.0	2.44	2.39	2.35	2.31	2.26	2.22	2.17	2.13	2.08	2.04
61.5	2.52	2.47	2.43	2.39	2.34	2.30	2.25	2.21	2.16	2.12
62.0	2.60	2.56	2.51	2.47	2.42	2.38	2.33	2.29	2.24	2.20
62.5	2.68	2.64	2.59	2.55	2.50	2.46	2.41	2.37	2.32	2.28
63.0	2.76	2.72	2.67	2.63	2.58	2.54	2.49	2.45	2.40	2.36
63.5	2.84	2.80	2.75	2.71	2.66	2.62	2.57	2.53	2.48	2.44
64.0	2.92	2.88	2.83	2.79	2.74	2.70	2.65	2.61	2.56	2.52
64.5	3.00	2.96	2.91	2.87	2.82	2.78	2.73	2.69	2.64	2.60
65.0	3.08	3.04	2.99	2.95	2.90	2.86	2.81	2.77	2.72	2.68
65.5	3.16	3.12	3.07	3.03	2.98	2.94	2.89	2.85	2.81	2.76
66.0	3.24	3.20	3.15	3.11	3.06	3.02	2.97	2.93	2.89	2.84
66.5	3.32	3.28	3.23	3.19	3.14	3.10	3.06	3.01	2.97	2.92
67.0	3.40	3.36	3.31	3.27	3.22	3.18	3.14	3.09	3.05	3.00
67.5	3.48	3.44	3.39	3.35	3.31	3.26	3.22	3.17	3.13	3.08
68.0	3.56	3.52	3.48	3.43	3.39	3.34	3.30	3.25	3.21	3.16
68.5	3.64	3.60	3.56	3.51	3.47	3.42	3.38	3.33	3.29	3.24
69.0	3.73	3.68	3.64	3.59	3.55	3.50	3.46	3.41	3.37	3.32
69.5	3.81	3.76	3.72	3.67	3.63	3.58	3.54	3.49	3.45	3.40
70.0	3.89	3.84	3.80	3.75	3.71	3.66	3.62	3.57	3.53	3.48
70.5	3.97	3.92	3.88	3.83	3.79	3.74	3.70	3.65	3.61	3.56
71.0	4.05	4.00	3.96	3.91	3.87	3.82	3.78	3.73	3.69	3.64
71.5	4.13	4.08	4.04	3.99	3.95	3.90	3.86	3.81	3.77	3.73
72.0	4.21	4.16	4.12	4.07	4.03	3.98	3.94	3.89	3.85	3.81
72.5	4.29	4.24	4.20	4.15	4.11	4.06	4.02	3.98	3.93	3.89
73.0	4.37	4.32	4.28	4.23	4.19	4.14	4.10	4.06	4.01	3.97
73.5	4.45	4.40	4.36	4.31	4.27	4.23	4.18	4.14	4.09	4.05
74.0	4.53	4.48	4.44	4.40	4.35	4.31	4.26	4.22	4.17	4.13
74.5	4.61	4.56	4.52	4.48	4.43	4.39	4.34	4.30	4.25	4.21
75.0	4.69	4.65	4.60	4.56	4.51	4.47	4.42	4.38	4.33	4.29
75.5	4.77	4.73	4.68	4.64	4.59	4.55	4.50	4.46	4.41	4.37
76.0	4.85	4.81	4.76	4.72	4.67	4.63	4.58	4.54	4.49	4.45
76.5	4.93	4.89	4.84	4.80	4.75	4.71	4.66	4.62	4.57	4.53
77.0	5.01	4.97	4.92	4.88	4.83	4.79	4.74	4.70	4.65	4.61
77.5	5.09	5.05	5.00	4.96	4.91	4.87	4.82	4.78	4.73	4.69
78.0	5.17	5.13	5.08	5.04	4.99	4.95	4.90	4.86	4.81	4.77
78.5	5.25	5.21	5.16	5.12	5.07	5.03	4.98	4.94	4.90	4.85
79.0	5.33	5.29	5.24	5.20	5.15	5.11	5.06	5.02	4.98	4.93
79.5	5.41	5.37	5.32	5.28	5.23	5.19	5.15	5.10	5.06	5.01
80.0	5.49	5.45	5.40	5.36	5.32	5.27	5.23	5.18	5.14	5.09
80.5	5.57	5.53	5.48	5.44	5.40	5.35	5.31	5.26	5.22	5.17
81.0	5.65	5.61	5.57	5.52	5.48	5.43	5.39	5.34	5.30	5.25
81.5	5.74	5.69	5.65	5.60	5.56	5.51	5.47	5.42	5.38	5.33
82.0	5.82	5.77	5.73	5.68	5.64	5.59	5.55	5.50	5.46	5.41
82.5	5.90	5.85	5.81	5.76	5.72	5.67	5.63	5.58	5.54	5.49
83.0	5.98	5.93	5.89	5.84	5.80	5.75	5.71	5.66	5.62	5.57
83.5	6.06	6.01	5.97	5.92	5.88	5.83	5.79	5.74	5.70	5.65
84.0	6.14	6.09	6.05	6.00	5.96	5.91	5.87	5.82	5.78	5.73
84.5	6.22	6.17	6.13	6.08	6.04	5.99	5.95	5.90	5.86	5.82
85.0	6.30	6.26	6.21	6.16	6.12	6.07	6.03	5.98	5.94	5.90



TABLE 1a: MALES FVC—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 55 to 75										
	55	57	59	61	63	65	67	69	71	73	75
56.0	1.19	1.14	1.10	1.05	1.01	0.96	0.92	0.88	0.83	0.79	0.74
56.5	1.27	1.22	1.18	1.13	1.09	1.05	1.00	0.96	0.91	0.87	0.82
57.0	1.35	1.30	1.26	1.21	1.17	1.13	1.08	1.04	0.99	0.95	0.90
57.5	1.43	1.38	1.34	1.30	1.25	1.21	1.16	1.12	1.07	1.03	0.98
58.0	1.51	1.47	1.42	1.38	1.33	1.29	1.24	1.20	1.15	1.11	1.06
58.5	1.59	1.55	1.50	1.46	1.41	1.37	1.32	1.28	1.23	1.19	1.14
59.0	1.67	1.63	1.58	1.54	1.49	1.45	1.40	1.36	1.31	1.27	1.22
59.5	1.75	1.71	1.66	1.62	1.57	1.53	1.48	1.44	1.39	1.35	1.30
60.0	1.83	1.79	1.74	1.70	1.65	1.61	1.56	1.52	1.47	1.43	1.38
60.5	1.91	1.87	1.82	1.78	1.73	1.69	1.64	1.60	1.55	1.51	1.46
61.0	1.99	1.95	1.90	1.86	1.81	1.77	1.72	1.68	1.63	1.59	1.55
61.5	2.07	2.03	1.98	1.94	1.89	1.85	1.80	1.76	1.71	1.67	1.63
62.0	2.15	2.11	2.06	2.02	1.97	1.93	1.88	1.84	1.80	1.75	1.71
62.5	2.23	2.19	2.14	2.10	2.05	2.01	1.97	1.92	1.88	1.83	1.79
63.0	2.31	2.27	2.22	2.18	2.13	2.09	2.05	2.00	1.96	1.91	1.87
63.5	2.39	2.35	2.30	2.26	2.22	2.17	2.13	2.08	2.04	1.99	1.95
64.0	2.47	2.43	2.39	2.34	2.30	2.25	2.21	2.16	2.12	2.07	2.03
64.5	2.55	2.51	2.47	2.42	2.38	2.33	2.29	2.24	2.20	2.15	2.11
65.0	2.64	2.59	2.55	2.50	2.46	2.41	2.37	2.32	2.28	2.23	2.19
65.5	2.72	2.67	2.63	2.58	2.54	2.49	2.45	2.40	2.36	2.31	2.27
66.0	2.80	2.75	2.71	2.66	2.62	2.57	2.53	2.48	2.44	2.39	2.35
66.5	2.88	2.83	2.79	2.74	2.70	2.65	2.61	2.56	2.52	2.47	2.43
67.0	2.96	2.91	2.87	2.82	2.78	2.73	2.69	2.64	2.60	2.55	2.51
67.5	3.04	2.99	2.95	2.90	2.86	2.81	2.77	2.72	2.68	2.63	2.59
68.0	3.12	3.07	3.03	2.98	2.94	2.89	2.85	2.80	2.76	2.72	2.67
68.5	3.20	3.15	3.11	3.06	3.02	2.97	2.93	2.89	2.84	2.80	2.75
69.0	3.28	3.23	3.19	3.14	3.10	3.05	3.01	2.97	2.92	2.88	2.83
69.5	3.36	3.31	3.27	3.22	3.18	3.14	3.09	3.05	3.00	2.96	2.91
70.0	3.44	3.39	3.35	3.31	3.26	3.22	3.17	3.13	3.08	3.04	2.99
70.5	3.52	3.47	3.43	3.39	3.34	3.30	3.25	3.21	3.16	3.12	3.07
71.0	3.60	3.56	3.51	3.47	3.42	3.38	3.33	3.29	3.24	3.20	3.15
71.5	3.68	3.64	3.59	3.55	3.50	3.46	3.41	3.37	3.32	3.28	3.23
72.0	3.76	3.72	3.67	3.63	3.58	3.54	3.49	3.45	3.40	3.36	3.31
72.5	3.84	3.80	3.75	3.71	3.66	3.62	3.57	3.53	3.48	3.44	3.39
73.0	3.92	3.88	3.83	3.79	3.74	3.70	3.65	3.61	3.56	3.52	3.47
73.5	4.00	3.96	3.91	3.87	3.82	3.78	3.73	3.69	3.64	3.60	3.55
74.0	4.08	4.04	3.99	3.95	3.90	3.86	3.81	3.77	3.72	3.68	3.64
74.5	4.16	4.12	4.07	4.03	3.98	3.94	3.89	3.85	3.81	3.76	3.72
75.0	4.24	4.20	4.15	4.11	4.06	4.02	3.97	3.93	3.89	3.84	3.80
75.5	4.32	4.28	4.23	4.19	4.14	4.10	4.06	4.01	3.97	3.92	3.88
76.0	4.40	4.36	4.31	4.27	4.23	4.18	4.14	4.09	4.05	4.00	3.96
76.5	4.48	4.44	4.39	4.35	4.31	4.26	4.22	4.17	4.13	4.08	4.04
77.0	4.56	4.52	4.48	4.43	4.39	4.34	4.30	4.25	4.21	4.16	4.12
77.5	4.65	4.60	4.56	4.51	4.47	4.42	4.38	4.33	4.29	4.24	4.20
78.0	4.73	4.68	4.64	4.59	4.55	4.50	4.46	4.41	4.37	4.32	4.28
78.5	4.81	4.76	4.72	4.67	4.63	4.58	4.54	4.49	4.45	4.40	4.36
79.0	4.89	4.84	4.80	4.75	4.71	4.66	4.62	4.57	4.53	4.48	4.44
79.5	4.97	4.92	4.88	4.83	4.79	4.74	4.70	4.65	4.61	4.56	4.52
80.0	5.05	5.00	4.96	4.91	4.87	4.82	4.78	4.73	4.69	4.64	4.60
80.5	5.13	5.08	5.04	4.99	4.95	4.90	4.86	4.81	4.77	4.73	4.68
81.0	5.21	5.16	5.12	5.07	5.03	4.98	4.94	4.89	4.85	4.81	4.76
81.5	5.29	5.24	5.20	5.15	5.11	5.06	5.02	4.98	4.93	4.89	4.84
82.0	5.37	5.32	5.28	5.23	5.19	5.15	5.10	5.06	5.01	4.97	4.92
82.5	5.45	5.40	5.36	5.31	5.27	5.23	5.18	5.14	5.09	5.05	5.00
83.0	5.53	5.48	5.44	5.40	5.35	5.31	5.26	5.22	5.17	5.13	5.08
83.5	5.61	5.56	5.52	5.48	5.43	5.39	5.34	5.30	5.25	5.21	5.16
84.0	5.69	5.65	5.60	5.56	5.51	5.47	5.42	5.38	5.33	5.29	5.24
84.5	5.77	5.73	5.68	5.64	5.59	5.55	5.50	5.46	5.41	5.37	5.32
85.0	5.85	5.81	5.76	5.72	5.67	5.63	5.58	5.54	5.49	5.45	5.40

TABLE 2: MALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 35 to 53									
	35	37	39	41	43	45	47	49	51	53
56.0	1.44	1.40	1.35	1.31	1.27	1.22	1.18	1.14	1.09	1.05
56.5	1.51	1.46	1.42	1.37	1.33	1.29	1.24	1.20	1.15	1.11
57.0	1.57	1.52	1.48	1.44	1.39	1.35	1.31	1.26	1.22	1.17
57.5	1.63	1.59	1.54	1.50	1.46	1.41	1.37	1.33	1.28	1.24
58.0	1.70	1.65	1.61	1.56	1.52	1.48	1.43	1.39	1.34	1.30
58.5	1.76	1.71	1.67	1.63	1.58	1.54	1.50	1.45	1.41	1.36
59.0	1.82	1.78	1.73	1.69	1.65	1.60	1.56	1.52	1.47	1.43
59.5	1.89	1.84	1.80	1.75	1.71	1.67	1.62	1.58	1.53	1.49
60.0	1.95	1.90	1.86	1.82	1.77	1.73	1.69	1.64	1.60	1.55
60.5	2.01	1.97	1.92	1.88	1.84	1.79	1.75	1.71	1.66	1.62



TABLE 2: MALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983—Continued

Height	Ages 35 to 53									
	35	37	39	41	43	45	47	49	51	53
61.0	2.08	2.03	1.99	1.94	1.90	1.86	1.81	1.77	1.72	1.68
61.5	2.14	2.09	2.05	2.01	1.96	1.92	1.88	1.83	1.79	1.74
62.0	2.20	2.16	2.11	2.07	2.03	1.98	1.94	1.90	1.85	1.81
62.5	2.27	2.22	2.18	2.13	2.09	2.05	2.00	1.96	1.91	1.87
63.0	2.33	2.28	2.24	2.20	2.15	2.11	2.07	2.02	1.98	1.93
63.5	2.39	2.35	2.30	2.26	2.22	2.17	2.13	2.09	2.04	2.00
64.0	2.46	2.41	2.37	2.32	2.28	2.24	2.19	2.15	2.10	2.06
64.5	2.52	2.47	2.43	2.39	2.34	2.30	2.26	2.21	2.17	2.12
65.0	2.58	2.54	2.49	2.45	2.41	2.36	2.32	2.28	2.23	2.19
65.5	2.65	2.60	2.56	2.51	2.47	2.43	2.38	2.34	2.29	2.25
66.0	2.71	2.66	2.62	2.58	2.53	2.49	2.45	2.40	2.36	2.31
66.5	2.77	2.73	2.68	2.64	2.60	2.55	2.51	2.47	2.42	2.38
67.0	2.84	2.79	2.75	2.70	2.66	2.62	2.57	2.53	2.48	2.44
67.5	2.90	2.85	2.81	2.77	2.72	2.68	2.64	2.59	2.55	2.50
68.0	2.96	2.92	2.87	2.83	2.79	2.74	2.70	2.66	2.61	2.57
68.5	3.03	2.98	2.94	2.89	2.85	2.81	2.76	2.72	2.67	2.63
69.0	3.09	3.04	3.00	2.96	2.91	2.87	2.83	2.78	2.74	2.69
69.5	3.15	3.11	3.06	3.02	2.98	2.93	2.89	2.85	2.80	2.76
70.0	3.22	3.17	3.13	3.08	3.04	3.00	2.95	2.91	2.86	2.82
70.5	3.28	3.23	3.19	3.15	3.10	3.06	3.02	2.97	2.93	2.88
71.0	3.34	3.30	3.25	3.21	3.17	3.12	3.08	3.04	2.99	2.95
71.5	3.41	3.36	3.32	3.27	3.23	3.19	3.14	3.10	3.05	3.01
72.0	3.47	3.42	3.38	3.34	3.29	3.25	3.21	3.16	3.12	3.07
72.5	3.53	3.49	3.44	3.36	3.31	3.27	3.23	3.18	3.14	3.09
73.0	3.60	3.55	3.51	3.46	3.42	3.38	3.33	3.29	3.24	3.20
73.5	3.66	3.61	3.57	3.53	3.48	3.44	3.40	3.35	3.31	3.26
74.0	3.72	3.68	3.63	3.59	3.55	3.50	3.46	3.37	3.33	3.28
74.5	3.79	3.74	3.70	3.65	3.61	3.57	3.52	3.48	3.43	3.39
75.0	3.85	3.80	3.76	3.72	3.67	3.63	3.54	3.50	3.45	3.41
75.5	3.91	3.87	3.82	3.78	3.74	3.69	3.65	3.61	3.56	3.52
76.0	3.98	3.93	3.89	3.84	3.80	3.76	3.71	3.67	3.62	3.58
76.5	4.04	3.99	3.95	3.91	3.86	3.82	3.78	3.73	3.69	3.64
77.0	4.10	4.06	4.01	3.97	3.93	3.88	3.84	3.75	3.71	3.66
77.5	4.17	4.12	4.08	4.03	3.99	3.95	3.90	3.86	3.81	3.77
78.0	4.23	4.18	4.14	4.10	4.05	4.01	3.97	3.92	3.88	3.83
78.5	4.29	4.25	4.20	4.16	4.12	4.07	4.03	3.99	3.94	3.90
79.0	4.36	4.31	4.27	4.22	4.18	4.14	4.09	4.05	4.00	3.96
79.5	4.42	4.37	4.33	4.29	4.24	4.20	4.16	4.11	4.07	4.02
80.0	4.48	4.44	4.39	4.35	4.31	4.26	4.22	4.18	4.13	4.09
80.5	4.55	4.50	4.46	4.41	4.37	4.33	4.28	4.24	4.20	4.15
81.0	4.61	4.56	4.52	4.48	4.43	4.39	4.35	4.30	4.26	4.21
81.5	4.67	4.63	4.58	4.54	4.50	4.45	4.41	4.37	4.32	4.28
82.0	4.74	4.69	4.65	4.60	4.56	4.52	4.47	4.43	4.39	4.30
82.5	4.80	4.75	4.71	4.67	4.62	4.58	4.54	4.49	4.45	4.40
83.0	4.86	4.82	4.77	4.73	4.69	4.64	4.60	4.56	4.51	4.47
83.5	4.93	4.88	4.84	4.79	4.75	4.71	4.66	4.62	4.58	4.53
84.0	4.99	4.95	4.90	4.86	4.81	4.77	4.73	4.68	4.64	4.59
84.5	5.05	5.01	4.96	4.92	4.88	4.83	4.79	4.75	4.70	4.66
85.0	5.12	5.07	5.03	4.98	4.94	4.90	4.85	4.81	4.77	4.72

TABLE 2a: MALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 55 to 75										
	55	57	59	61	63	65	67	69	71	73	75
56.0.....	1.00	0.96	0.92	0.87	0.83	0.78	0.74	0.70	0.65	0.61	0.57
56.5.....	1.07	1.02	0.98	0.94	0.89	0.85	0.80	0.76	0.72	0.67	0.63
57.0.....	1.13	1.09	1.04	1.00	0.96	0.91	0.87	0.82	0.78	0.74	0.69
57.5.....	1.19	1.15	1.11	1.06	1.02	0.97	0.93	0.89	0.84	0.80	0.76
58.0.....	1.26	1.21	1.17	1.13	1.08	1.04	0.99	0.95	0.91	0.86	0.82
58.5.....	1.32	1.28	1.23	1.19	1.15	1.10	1.06	1.01	0.97	0.93	0.88
59.0.....	1.38	1.34	1.30	1.25	1.21	1.16	1.12	1.08	1.03	0.99	0.95
59.5.....	1.45	1.40	1.36	1.32	1.27	1.23	1.18	1.14	1.10	1.05	1.01
60.0.....	1.51	1.47	1.42	1.38	1.34	1.29	1.25	1.20	1.16	1.12	1.07
60.5.....	1.57	1.53	1.49	1.44	1.40	1.35	1.31	1.27	1.22	1.18	1.14
61.0.....	1.64	1.59	1.55	1.51	1.46	1.42	1.37	1.33	1.29	1.24	1.20
61.5.....	1.70	1.66	1.61	1.57	1.53	1.48	1.44	1.39	1.35	1.31	1.26
62.0.....	1.76	1.72	1.68	1.63	1.59	1.54	1.50	1.46	1.41	1.37	1.33
62.5.....	1.83	1.78	1.74	1.70	1.65	1.61	1.56	1.52	1.48	1.43	1.39
63.0.....	1.89	1.85	1.80	1.76	1.72	1.67	1.63	1.58	1.54	1.50	1.45
63.5.....	1.95	1.91	1.87	1.82	1.78	1.73	1.69	1.65	1.60	1.56	1.52
64.0.....	2.02	1.97	1.93	1.89	1.84	1.80	1.75	1.71	1.67	1.62	1.58
64.5.....	2.08	2.04	1.99	1.95	1.91	1.86	1.82	1.77	1.73	1.69	1.64
65.0.....	2.14	2.10	2.06	2.01	1.97	1.92	1.88	1.84	1.79	1.75	1.71
65.5.....	2.21	2.16	2.12	2.08	2.03	1.99	1.94	1.90	1.86	1.81	1.77



TABLE 2a: MALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983—Continued

Height	Ages 55 to 75										
	55	57	59	61	63	65	67	69	71	73	75
66.0	2.27	2.23	2.18	2.14	2.10	2.05	2.01	1.96	1.92	1.88	1.83
66.5	2.33	2.29	2.25	2.20	2.16	2.11	2.07	2.03	1.98	1.94	1.90
67.0	2.40	2.35	2.31	2.27	2.22	2.18	2.13	2.09	2.05	2.00	1.96
67.5	2.46	2.42	2.37	2.33	2.29	2.24	2.20	2.15	2.11	2.07	2.02
68.0	2.52	2.48	2.44	2.39	2.35	2.30	2.26	2.22	2.17	2.13	2.09
68.5	2.59	2.54	2.50	2.46	2.41	2.37	2.32	2.28	2.24	2.19	2.15
69.0	2.65	2.61	2.56	2.52	2.48	2.43	2.39	2.34	2.30	2.26	2.21
69.5	2.71	2.67	2.63	2.58	2.54	2.49	2.45	2.41	2.36	2.32	2.28
70.0	2.78	2.73	2.69	2.65	2.60	2.56	2.51	2.47	2.43	2.38	2.34
70.5	2.84	2.80	2.75	2.72	2.67	2.62	2.58	2.53	2.49	2.45	2.40
71.0	2.90	2.86	2.82	2.77	2.73	2.68	2.64	2.60	2.55	2.51	2.47
71.5	2.97	2.92	2.88	2.84	2.79	2.75	2.70	2.66	2.62	2.57	2.53
72.0	3.03	2.99	2.94	2.90	2.86	2.81	2.77	2.72	2.68	2.64	2.59
72.5	3.09	3.05	3.01	2.96	2.92	2.87	2.83	2.79	2.74	2.70	2.66
73.0	3.16	3.11	3.07	3.03	2.98	2.94	2.89	2.85	2.81	2.76	2.72
73.5	3.22	3.18	3.13	3.09	3.05	3.00	2.96	2.91	2.87	2.83	2.78
74.0	3.28	3.24	3.20	3.15	3.11	3.06	3.02	2.98	2.92	2.89	2.85
74.5	3.35	3.30	3.26	3.22	3.17	3.13	3.08	3.04	3.00	2.95	2.91
75.0	3.41	3.37	3.32	3.28	3.24	3.19	3.15	3.10	3.06	3.02	2.97
75.5	3.47	3.43	3.39	3.34	3.30	3.26	3.21	3.17	3.12	3.08	3.04
76.0	3.54	3.49	3.45	3.41	3.36	3.32	3.27	3.23	3.19	3.14	3.10
76.5	3.60	3.56	3.51	3.47	3.43	3.38	3.34	3.29	3.25	3.21	3.16
77.0	3.66	3.62	3.58	3.53	3.49	3.45	3.40	3.36	3.31	3.27	3.23
77.5	3.73	3.68	3.64	3.60	3.55	3.51	3.46	3.42	3.38	3.33	3.29
78.0	3.79	3.75	3.70	3.66	3.62	3.57	3.53	3.48	3.44	3.40	3.35
78.5	3.85	3.81	3.77	3.72	3.68	3.64	3.59	3.55	3.50	3.46	3.42
79.0	3.92	3.87	3.83	3.79	3.74	3.70	3.65	3.61	3.57	3.52	3.48
79.5	3.98	3.94	3.89	3.85	3.81	3.76	3.72	3.67	3.63	3.59	3.54
80.0	4.04	4.00	3.96	3.91	3.87	3.83	3.78	3.74	3.69	3.65	3.61
80.5	4.11	4.06	4.02	3.98	3.93	3.89	3.84	3.80	3.76	3.71	3.67
81.0	4.17	4.13	4.08	4.04	4.00	3.95	3.91	3.86	3.82	3.78	3.73
81.5	4.23	4.19	4.15	4.10	4.06	4.02	3.97	3.93	3.88	3.84	3.80
82.0	4.30	4.25	4.21	4.17	4.12	4.08	4.03	3.99	3.95	3.90	3.86
82.5	4.36	4.32	4.27	4.23	4.19	4.14	4.10	4.05	4.01	3.97	3.92
83.0	4.42	4.38	4.34	4.29	4.25	4.21	4.16	4.12	4.07	4.03	3.99
83.5	4.49	4.44	4.40	4.36	4.31	4.27	4.22	4.18	4.14	4.09	4.05
84.0	4.55	4.51	4.46	4.42	4.38	4.33	4.29	4.24	4.20	4.16	4.11
84.5	4.61	4.57	4.53	4.48	4.44	4.40	4.35	4.31	4.26	4.22	4.18
85.0	4.68	4.63	4.59	4.55	4.50	4.46	4.41	4.37	4.33	4.28	4.24

TABLE 3: FEMALES FVC—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 35 to 55										
	35	37	39	41	43	45	47	49	51	53	55
52.0	1.56	1.53	1.51	1.48	1.46	1.43	1.41	1.38	1.36	1.33	1.31
52.5	1.60	1.58	1.55	1.52	1.50	1.47	1.45	1.42	1.40	1.37	1.35
53.0	1.64	1.62	1.59	1.57	1.54	1.52	1.49	1.47	1.44	1.42	1.39
53.5	1.69	1.66	1.63	1.61	1.58	1.56	1.53	1.51	1.48	1.46	1.43
54.0	1.73	1.70	1.68	1.65	1.63	1.60	1.58	1.55	1.52	1.50	1.47
54.5	1.77	1.74	1.72	1.69	1.67	1.64	1.62	1.59	1.57	1.54	1.52
55.0	1.81	1.79	1.76	1.74	1.71	1.69	1.66	1.63	1.61	1.58	1.56
55.5	1.85	1.83	1.80	1.78	1.75	1.73	1.70	1.68	1.65	1.63	1.60
56.0	1.90	1.87	1.85	1.82	1.80	1.77	1.74	1.72	1.69	1.67	1.64
56.5	1.94	1.91	1.89	1.86	1.84	1.81	1.79	1.76	1.74	1.71	1.69
57.0	1.98	1.96	1.93	1.91	1.88	1.85	1.83	1.80	1.78	1.75	1.73
57.5	2.02	2.00	1.97	1.95	1.92	1.90	1.87	1.85	1.82	1.80	1.77
58.0	2.07	2.04	2.02	1.99	1.96	1.94	1.91	1.89	1.86	1.84	1.81
58.5	2.11	2.08	2.06	2.03	2.01	1.98	1.96	1.93	1.91	1.88	1.85
59.0	2.15	2.13	2.10	2.07	2.05	2.02	2.00	1.97	1.95	1.92	1.90
59.5	2.19	2.17	2.14	2.12	2.09	2.07	2.04	2.02	1.99	1.96	1.94
60.0	2.24	2.21	2.18	2.16	2.13	2.11	2.08	2.06	2.03	2.01	1.98
60.5	2.28	2.25	2.23	2.20	2.18	2.15	2.13	2.10	2.07	2.05	2.02
61.0	2.32	2.29	2.27	2.24	2.22	2.19	2.17	2.14	2.12	2.09	2.07
61.5	2.36	2.34	2.31	2.29	2.26	2.24	2.21	2.18	2.16	2.13	2.11
62.0	2.40	2.38	2.35	2.33	2.30	2.28	2.25	2.23	2.20	2.18	2.15
62.5	2.45	2.42	2.40	2.37	2.35	2.32	2.29	2.27	2.24	2.22	2.19
63.0	2.49	2.46	2.44	2.41	2.39	2.36	2.34	2.31	2.29	2.26	2.24
63.5	2.53	2.51	2.48	2.46	2.43	2.40	2.38	2.35	2.33	2.30	2.28
64.0	2.57	2.55	2.52	2.50	2.47	2.45	2.42	2.40	2.37	2.35	2.32
64.5	2.62	2.59	2.57	2.54	2.51	2.49	2.46	2.44	2.41	2.39	2.36
65.0	2.66	2.63	2.61	2.58	2.56	2.53	2.51	2.48	2.46	2.43	2.40
65.5	2.70	2.68	2.65	2.62	2.60	2.57	2.55	2.52	2.50	2.47	2.45
66.0	2.74	2.72	2.69	2.67	2.64	2.62	2.59	2.57	2.54	2.51	2.49
66.5	2.79	2.76	2.73	2.71	2.68	2.66	2.63	2.61	2.58	2.56	2.53



TABLE 3: FEMALES FVC—75 PERCENT OF PREDICTED; KNUDSON 1983—Continued

Height	Ages 35 to 55										
	35	37	39	41	43	45	47	49	51	53	55
67.0	2.83	2.80	2.78	2.75	2.73	2.70	2.68	2.65	2.62	2.60	2.57
67.5	2.87	2.84	2.82	2.79	2.77	2.74	2.72	2.69	2.67	2.64	2.62
68.0	2.91	2.89	2.86	2.84	2.81	2.79	2.76	2.73	2.71	2.68	2.66
68.5	2.95	2.93	2.90	2.88	2.85	2.83	2.80	2.78	2.75	2.73	2.70
69.0	3.00	2.97	2.95	2.92	2.90	2.87	2.84	2.82	2.79	2.77	2.74
69.5	3.04	3.01	2.99	2.96	2.94	2.91	2.89	2.86	2.84	2.81	2.79
70.0	3.08	3.06	3.03	3.01	2.98	2.95	2.93	2.90	2.88	2.85	2.83
70.5	3.12	3.10	3.07	3.05	3.02	3.00	2.97	2.95	2.92	2.90	2.87
71.0	3.17	3.14	3.11	3.09	3.06	3.04	3.01	2.99	2.96	2.94	2.91
71.5	3.21	3.18	3.16	3.13	3.11	3.08	3.06	3.03	3.01	2.98	2.95
72.0	3.25	3.22	3.20	3.17	3.15	3.12	3.10	3.07	3.05	3.02	3.00
72.5	3.29	3.27	3.24	3.22	3.19	3.17	3.14	3.12	3.09	3.06	3.04
73.0	3.33	3.31	3.28	3.26	3.23	3.21	3.18	3.16	3.13	3.11	3.08
73.5	3.38	3.35	3.33	3.30	3.28	3.25	3.23	3.20	3.17	3.15	3.12
74.0	3.42	3.39	3.37	3.34	3.32	3.29	3.27	3.24	3.22	3.19	3.17
74.5	3.46	3.44	3.41	3.39	3.36	3.33	3.31	3.28	3.26	3.23	3.21
75.0	3.50	3.48	3.45	3.43	3.40	3.38	3.35	3.33	3.30	3.28	3.25
75.5	3.55	3.52	3.50	3.47	3.44	3.42	3.39	3.37	3.34	3.32	3.29
76.0	3.59	3.56	3.54	3.51	3.49	3.46	3.44	3.41	3.39	3.36	3.34
76.5	3.63	3.61	3.58	3.55	3.53	3.50	3.48	3.45	3.43	3.40	3.38
77.0	3.67	3.65	3.62	3.60	3.57	3.55	3.52	3.50	3.47	3.45	3.42
77.5	3.72	3.69	3.66	3.64	3.61	3.59	3.56	3.54	3.51	3.49	3.46
78.0	3.76	3.73	3.71	3.68	3.66	3.63	3.61	3.58	3.55	3.53	3.50
78.5	3.80	3.77	3.75	3.72	3.70	3.67	3.65	3.62	3.60	3.57	3.55
79.0	3.84	3.82	3.79	3.77	3.74	3.72	3.69	3.66	3.64	3.61	3.59
79.5	3.88	3.86	3.83	3.81	3.78	3.76	3.73	3.71	3.68	3.66	3.63
80.0	3.93	3.90	3.88	3.85	3.83	3.80	3.77	3.75	3.72	3.70	3.67
80.5	3.97	3.94	3.92	3.89	3.87	3.84	3.82	3.79	3.77	3.74	3.72
81.0	4.01	3.99	3.96	3.94	3.91	3.88	3.86	3.83	3.81	3.78	3.76

TABLE 3a: FEMALES FVC—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 57 to 75									
	57	59	61	63	65	67	69	71	73	75
52.0	1.28	1.25	1.23	1.20	1.18	1.15	1.13	1.38	1.34	1.29
52.5	1.32	1.30	1.27	1.25	1.22	1.20	1.17	1.41	1.37	1.32
53.0	1.36	1.34	1.31	1.29	1.26	1.24	1.21	1.44	1.40	1.35
53.5	1.41	1.38	1.36	1.33	1.31	1.28	1.25	1.47	1.43	1.38
54.0	1.45	1.42	1.40	1.37	1.35	1.32	1.30	1.50	1.46	1.41
54.5	1.49	1.47	1.44	1.42	1.39	1.36	1.34	1.53	1.49	1.44
55.0	1.53	1.51	1.48	1.46	1.43	1.41	1.38	1.56	1.52	1.47
55.5	1.58	1.55	1.53	1.50	1.47	1.45	1.42	1.59	1.55	1.50
56.0	1.62	1.59	1.57	1.54	1.52	1.49	1.47	1.62	1.58	0.57
56.5	1.66	1.64	1.61	1.58	1.56	1.53	1.51	1.65	1.61	0.63
57.0	1.70	1.68	1.65	1.63	1.60	1.58	1.55	1.68	1.64	0.69
57.5	1.74	1.72	1.69	1.67	1.64	1.62	1.59	1.71	1.67	0.76
58.0	1.79	1.76	1.74	1.71	1.69	1.66	1.64	1.74	1.70	0.82
58.5	1.83	1.80	1.78	1.75	1.73	1.70	1.68	1.77	1.73	0.88
59.0	1.87	1.85	1.82	1.80	1.77	1.75	1.72	1.80	1.76	0.95
59.5	1.91	1.89	1.86	1.84	1.81	1.79	1.76	1.83	1.79	1.01
60.0	1.96	1.93	1.91	1.88	1.86	1.83	1.80	1.86	1.82	1.07
60.5	2.00	1.97	1.95	1.92	1.90	1.87	1.85	1.89	1.85	1.14
61.0	2.04	2.02	1.99	1.96	1.94	1.91	1.89	1.92	1.87	1.20
61.5	2.08	2.06	2.03	2.01	1.98	1.96	1.93	1.95	1.90	1.26
62.0	2.13	2.10	2.07	2.05	2.02	2.00	1.97	1.98	1.93	1.33
62.5	2.17	2.14	2.12	2.09	2.07	2.04	2.02	2.01	1.96	1.39
63.0	2.21	2.18	2.16	2.13	2.11	2.08	2.06	2.04	1.99	1.45
63.5	2.25	2.23	2.20	2.18	2.15	2.13	2.10	2.07	2.02	1.52
64.0	2.29	2.27	2.24	2.22	2.19	2.17	2.14	2.10	2.05	1.58
64.5	2.34	2.31	2.29	2.26	2.24	2.21	2.18	2.13	2.08	1.64
65.0	2.38	2.35	2.33	2.30	2.28	2.25	2.23	2.16	2.11	1.71
65.5	2.42	2.40	2.37	2.35	2.32	2.29	2.27	2.19	2.14	1.77
66.0	2.46	2.44	2.41	2.39	2.36	2.34	2.31	2.22	2.17	1.83
66.5	2.51	2.48	2.46	2.43	2.40	2.38	2.35	2.25	2.20	1.90
67.0	2.55	2.52	2.50	2.47	2.45	2.42	2.40	2.28	2.23	1.96
67.5	2.59	2.57	2.54	2.51	2.49	2.46	2.44	2.31	2.26	2.02
68.0	2.63	2.61	2.58	2.56	2.53	2.51	2.48	2.34	2.29	2.09
68.5	2.68	2.65	2.62	2.60	2.57	2.55	2.52	2.37	2.32	2.15
69.0	2.72	2.69	2.67	2.64	2.62	2.59	2.57	2.40	2.35	2.21
69.5	2.76	2.73	2.71	2.68	2.66	2.63	2.61	2.43	2.38	2.28
70.0	2.80	2.78	2.75	2.73	2.70	2.68	2.65	2.46	2.41	2.34
70.5	2.84	2.82	2.79	2.77	2.74	2.72	2.69	2.49	2.44	2.40
71.0	2.89	2.86	2.84	2.81	2.79	2.76	2.73	2.52	2.47	2.47
71.5	2.93	2.90	2.88	2.85	2.83	2.80	2.78	2.55	2.50	2.53



TABLE 3a: FEMALES FVC—75 PERCENT OF PREDICTED; KNUDSON 1983—Continued

Height	Ages 57 to 75									
	57	59	61	63	65	67	69	71	73	75
72.0	2.97	2.95	2.92	2.90	2.87	2.84	2.82	2.58	2.53	2.59
72.5	3.01	2.99	2.96	2.94	2.91	2.89	2.86	2.61	2.56	2.66
73.0	3.06	3.03	3.01	2.98	2.95	2.93	2.90	2.63	2.59	2.72
73.5	3.10	3.07	3.05	3.02	3.00	2.97	2.95	2.66	2.62	2.78
74.0	3.14	3.12	3.09	3.06	3.04	3.01	2.99	2.69	2.65	2.85
74.5	3.18	3.16	3.13	3.11	3.08	3.06	3.03	2.72	2.68	2.91
75.0	3.23	3.20	3.17	3.15	3.12	3.10	3.07	2.75	2.71	2.97
75.5	3.27	3.24	3.22	3.19	3.17	3.14	3.12	3.78	2.74	3.04
76.0	3.31	3.28	3.26	3.23	3.21	3.18	3.16	2.81	2.77	3.10
76.5	3.35	3.33	3.30	3.28	3.25	3.23	3.20	2.84	2.80	3.16
77.0	3.39	3.37	3.34	3.32	3.29	3.27	3.24	2.87	2.83	3.23
77.5	3.44	3.41	3.39	3.36	3.34	3.31	3.28	2.90	2.86	3.29
78.0	3.48	3.45	3.43	3.40	3.38	3.35	3.33	2.93	2.89	3.35
78.5	3.52	3.50	3.47	3.45	3.42	3.39	3.37	2.96	2.92	3.42
79.0	3.56	3.54	3.51	3.49	3.46	3.44	3.41	2.99	2.95	3.48
79.5	3.61	3.58	3.56	3.53	3.50	3.48	3.45	3.02	2.98	3.54
80.0	3.65	3.62	3.60	3.57	3.55	3.52	3.50	3.05	3.01	3.61
80.5	3.69	3.67	3.64	3.61	3.59	3.56	3.54	3.08	3.04	3.67
81.0	3.73	3.71	3.68	3.66	3.63	3.61	3.58	3.11	3.07	3.73

TABLE 4: FEMALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 35 to 55										
	35	37	39	41	43	45	47	49	51	53	55
52.0	1.42	1.40	1.37	1.34	1.31	1.28	1.25	1.22	1.20	1.17	1.14
52.5	1.46	1.43	1.40	1.37	1.34	1.31	1.28	1.26	1.23	1.20	1.17
53.0	1.49	1.46	1.43	1.40	1.37	1.35	1.32	1.29	1.26	1.23	1.20
53.5	1.52	1.49	1.46	1.43	1.41	1.38	1.35	1.32	1.29	1.26	1.23
54.0	1.55	1.52	1.49	1.47	1.44	1.41	1.38	1.35	1.32	1.29	1.27
54.5	1.58	1.55	1.53	1.50	1.47	1.44	1.41	1.38	1.35	1.33	1.30
55.0	1.61	1.59	1.56	1.53	1.50	1.47	1.44	1.41	1.39	1.36	1.33
55.5	1.65	1.62	1.59	1.56	1.53	1.50	1.47	1.45	1.42	1.39	1.36
56.0	1.68	1.65	1.62	1.59	1.56	1.53	1.51	1.48	1.45	1.42	1.39
56.5	1.71	1.68	1.65	1.62	1.59	1.57	1.54	1.51	1.48	1.45	1.42
57.0	1.74	1.71	1.68	1.66	1.63	1.60	1.57	1.54	1.51	1.48	1.46
57.5	1.77	1.74	1.72	1.69	1.66	1.63	1.60	1.57	1.54	1.52	1.49
58.0	1.80	1.78	1.75	1.72	1.69	1.66	1.63	1.60	1.58	1.55	1.52
58.5	1.84	1.81	1.78	1.75	1.72	1.69	1.66	1.64	1.61	1.58	1.55
59.0	1.87	1.84	1.81	1.78	1.75	1.72	1.70	1.67	1.64	1.61	1.58
59.5	1.90	1.87	1.84	1.81	1.78	1.76	1.73	1.70	1.67	1.64	1.61
60.0	1.93	1.90	1.87	1.84	1.82	1.79	1.76	1.73	1.70	1.67	1.65
60.5	1.96	1.93	1.90	1.88	1.85	1.82	1.79	1.76	1.73	1.71	1.68
61.0	1.99	1.97	1.94	1.91	1.88	1.85	1.82	1.79	1.77	1.74	1.71
61.5	2.03	2.00	1.97	1.94	1.91	1.88	1.85	1.83	1.80	1.77	1.74
62.0	2.06	2.03	2.00	1.97	1.94	1.91	1.89	1.86	1.83	1.80	1.77
62.5	2.09	2.06	2.03	2.00	1.97	1.95	1.92	1.89	1.86	1.83	1.80
63.0	2.12	2.09	2.06	2.03	2.01	1.98	1.95	1.92	1.89	1.86	1.83
63.5	2.15	2.12	2.09	2.07	2.04	2.01	1.98	1.95	1.92	1.90	1.87
64.0	2.18	2.15	2.13	2.10	2.07	2.04	2.01	1.98	1.96	1.93	1.90
64.5	2.21	2.19	2.16	2.13	2.10	2.07	2.04	2.02	1.99	1.96	1.93
65.0	2.25	2.22	2.19	2.16	2.13	2.10	2.08	2.05	2.02	1.99	1.96
65.5	2.28	2.25	2.22	2.19	2.16	2.14	2.11	2.08	2.05	2.02	1.99
66.0	2.31	2.28	2.25	2.22	2.20	2.17	2.14	2.11	2.08	2.05	2.02
66.5	2.34	2.31	2.28	2.26	2.23	2.20	2.17	2.14	2.11	2.08	2.06
67.0	2.37	2.34	2.32	2.29	2.26	2.23	2.20	2.17	2.14	2.12	2.09
67.5	2.40	2.38	2.35	2.32	2.29	2.26	2.23	2.21	2.18	2.15	2.12
68.0	2.44	2.41	2.38	2.35	2.32	2.29	2.27	2.24	2.21	2.18	2.15
68.5	2.47	2.44	2.41	2.38	2.35	2.33	2.30	2.27	2.24	2.21	2.18
69.0	2.50	2.47	2.44	2.41	2.39	2.36	2.33	2.30	2.27	2.24	2.21
69.5	2.53	2.50	2.47	2.45	2.42	2.39	2.36	2.33	2.30	2.27	2.25
70.0	2.56	2.53	2.51	2.48	2.45	2.42	2.39	2.36	2.33	2.31	2.28
70.5	2.59	2.57	2.54	2.51	2.48	2.45	2.42	2.39	2.37	2.34	2.31
71.0	2.63	2.60	2.57	2.54	2.51	2.48	2.45	2.43	2.40	2.37	2.34
71.5	2.66	2.63	2.60	2.57	2.54	2.52	2.49	2.46	2.43	2.40	2.37
72.0	2.69	2.66	2.63	2.60	2.58	2.55	2.52	2.49	2.46	2.43	2.40
72.5	2.72	2.69	2.66	2.64	2.61	2.58	2.55	2.52	2.49	2.46	2.44
73.0	2.75	2.72	2.70	2.67	2.64	2.61	2.58	2.55	2.52	2.50	2.47
73.5	2.78	2.76	2.73	2.70	2.67	2.64	2.61	2.58	2.56	2.53	2.50
74.0	2.82	2.79	2.76	2.73	2.70	2.67	2.64	2.62	2.59	2.56	2.53
74.5	2.85	2.82	2.79	2.76	2.73	2.70	2.68	2.65	2.62	2.59	2.56
75.0	2.88	2.85	2.82	2.79	2.76	2.74	2.71	2.68	2.65	2.62	2.59
75.5	2.91	2.88	2.85	2.83	2.80	2.77	2.74	2.71	2.68	2.65	2.63
76.0	2.94	2.91	2.89	2.86	2.83	2.80	2.77	2.74	2.71	2.69	2.66
76.5	2.97	2.95	2.92	2.89	2.86	2.83	2.80	2.77	2.75	2.72	2.69



TABLE 4: FEMALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983—Continued

Height	Ages 35 to 55										
	35	37	39	41	43	45	47	49	51	53	55
77.0	3.01	2.98	2.95	2.92	2.89	2.85	2.83	2.81	2.78	2.75	2.72
77.5	3.04	3.01	2.98	2.95	2.92	2.89	2.87	2.84	2.81	2.78	2.75
78.0	3.07	3.04	3.01	2.98	2.95	2.93	2.90	2.87	2.84	2.81	2.78
78.5	3.10	3.07	3.04	3.01	2.99	2.96	2.93	2.90	2.87	2.84	2.82
79.0	3.13	3.10	3.07	3.05	3.02	2.99	2.96	2.93	2.90	2.88	2.85
79.5	3.16	3.14	3.11	3.08	3.05	3.02	2.99	2.96	2.94	2.91	2.88
80.0	3.20	3.17	3.14	3.11	3.08	3.05	3.02	3.00	2.97	2.94	2.91
80.5	3.23	3.20	3.17	3.14	3.11	3.08	3.06	3.03	3.00	2.97	2.94
81.0	3.26	3.23	3.20	3.17	3.14	3.12	3.09	3.06	3.03	3.00	2.97

TABLE 4a: FEMALES FEV1—75 PERCENT OF PREDICTED; KNUDSON 1983

Height	Ages 57 to 75									
	57	59	61	63	65	67	69	71	73	75
52.0	1.11	1.08	1.05	1.03	1.00	0.97	0.94	1.29	1.23	0.74
52.5	1.14	1.11	1.09	1.06	1.03	1.00	0.97	1.31	1.25	0.82
53.0	1.17	1.15	1.12	1.09	1.06	1.03	1.00	1.32	1.26	0.90
53.5	1.21	1.18	1.15	1.12	1.09	1.06	1.03	1.33	1.27	0.98
54.0	1.24	1.21	1.18	1.15	1.12	1.09	1.07	1.35	1.29	1.06
54.5	1.27	1.24	1.21	1.18	1.15	1.13	1.10	1.36	1.30	1.14
55.0	1.30	1.27	1.24	1.22	1.19	1.16	1.13	1.37	1.32	1.22
55.5	1.33	1.30	1.28	1.25	1.22	1.19	1.16	1.39	1.33	1.30
56.0	1.36	1.34	1.31	1.28	1.25	1.22	1.19	1.40	1.34	1.38
56.5	1.40	1.37	1.34	1.31	1.28	1.25	1.22	1.42	1.36	1.46
57.0	1.43	1.40	1.37	1.34	1.31	1.28	1.26	1.43	1.37	1.55
57.5	1.46	1.43	1.40	1.37	1.34	1.32	1.29	1.44	1.38	1.63
58.0	1.49	1.46	1.43	1.40	1.38	1.35	1.32	1.46	1.40	1.71
58.5	1.52	1.49	1.46	1.44	1.41	1.38	1.35	1.47	1.41	1.79
59.0	1.55	1.53	1.50	1.47	1.44	1.41	1.38	1.48	1.42	1.87
59.5	1.59	1.56	1.53	1.50	1.47	1.44	1.41	1.50	1.44	1.95
60.0	1.62	1.59	1.56	1.53	1.50	1.47	1.45	1.51	1.45	2.03
60.5	1.65	1.62	1.59	1.56	1.53	1.51	1.48	1.52	1.46	2.11
61.0	1.68	1.65	1.62	1.59	1.57	1.54	1.51	1.54	1.48	2.19
61.5	1.71	1.68	1.65	1.63	1.60	1.57	1.54	1.55	1.49	2.27
62.0	1.74	1.71	1.69	1.66	1.63	1.60	1.57	1.57	1.51	2.35
62.5	1.77	1.75	1.72	1.69	1.66	1.63	1.60	1.58	1.52	2.43
63.0	1.81	1.78	1.75	1.72	1.69	1.66	1.64	1.59	1.53	2.51
63.5	1.84	1.81	1.78	1.75	1.72	1.70	1.67	1.61	1.55	2.59
64.0	1.87	1.84	1.81	1.78	1.76	1.73	1.70	1.62	1.56	2.67
64.5	1.90	1.87	1.84	1.82	1.79	1.76	1.73	1.63	1.57	2.75
65.0	1.93	1.90	1.88	1.85	1.82	1.79	1.76	1.65	1.59	2.83
65.5	1.96	1.94	1.91	1.88	1.85	1.82	1.79	1.66	1.60	2.91
66.0	2.00	1.97	1.94	1.91	1.88	1.85	1.83	1.67	1.61	2.99
66.5	2.03	2.00	1.97	1.94	1.91	1.89	1.86	1.69	1.63	3.07
67.0	2.06	2.03	2.00	1.97	1.95	1.92	1.89	1.70	1.64	3.15
67.5	2.09	2.06	2.03	2.01	1.98	1.95	1.92	1.72	1.66	3.23
68.0	2.12	2.09	2.07	2.04	2.01	1.98	1.95	1.73	1.67	3.31
68.5	2.15	2.13	2.10	2.07	2.04	2.01	1.98	1.74	1.68	3.39
69.0	2.19	2.16	2.13	2.10	2.07	2.04	2.01	1.76	1.70	3.47
69.5	2.22	2.19	2.16	2.13	2.10	2.08	2.05	1.77	1.71	3.55
70.0	2.25	2.22	2.19	2.16	2.14	2.11	2.08	1.78	1.72	3.63
70.5	2.28	2.25	2.22	2.20	2.17	2.14	2.11	1.80	1.74	3.71
71.0	2.31	2.28	2.26	2.23	2.20	2.17	2.14	1.81	1.75	3.79
71.5	2.34	2.32	2.29	2.26	2.23	2.20	2.17	1.82	1.76	3.87
72.0	2.38	2.35	2.32	2.29	2.26	2.23	2.20	1.84	1.78	3.95
72.5	2.41	2.38	2.35	2.32	2.29	2.26	2.24	1.85	1.79	4.03
73.0	2.44	2.41	2.38	2.35	2.32	2.30	2.27	1.87	1.81	4.11
73.5	2.47	2.44	2.41	2.39	2.36	2.33	2.30	1.88	1.82	4.19
74.0	2.50	2.47	2.45	2.42	2.39	2.36	2.33	1.89	1.83	4.27
74.5	2.53	2.51	2.48	2.45	2.42	2.39	2.36	1.91	1.85	4.35
75.0	2.57	2.54	2.51	2.48	2.45	2.42	2.39	1.92	1.86	4.43
75.5	2.60	2.57	2.54	2.51	2.48	2.45	2.43	1.93	1.87	4.51
76.0	2.63	2.60	2.57	2.54	2.51	2.49	2.46	1.95	1.89	4.59
76.5	2.66	2.63	2.60	2.57	2.55	2.52	2.49	1.96	1.90	4.67
77.0	2.69	2.66	2.63	2.61	2.58	2.55	2.52	1.97	1.91	4.75
77.5	2.72	2.70	2.67	2.64	2.61	2.58	2.55	1.99	1.93	4.83
78.0	2.76	2.73	2.70	2.67	2.64	2.61	2.58	2.00	1.94	4.91
78.5	2.79	2.76	2.73	2.70	2.67	2.64	2.62	2.01	1.96	4.99
79.0	2.82	2.79	2.76	2.73	2.70	2.68	2.65	2.03	1.97	5.07
79.5	2.85	2.82	2.79	2.76	2.74	2.71	2.68	2.04	1.98	5.15
80.0	2.88	2.85	2.82	2.80	2.77	2.74	2.71	2.06	2.00	5.23
80.5	2.91	2.88	2.86	2.83	2.80	2.77	2.74	2.07	2.01	5.31
81.0	2.94	2.92	2.89	2.86	2.83	2.80	2.77	2.08	2.02	5.39



**Appendix B to Part 79—Blood-Gas Tables**

For arterial blood-gas studies performed at test locations between sea level and 2,999 feet above sea level:

Arterial pCO <sub>2</sub>	and arterial pO <sub>2</sub>
25 mmHg or below.....	80 mmHg or below.
26 mmHg.....	79 mmHg or below.
27 mmHg.....	78 mmHg or below.
28 mmHg.....	77 mmHg or below.
29 mmHg.....	76 mmHg or below.
30 mmHg.....	75 mmHg or below.
31 mmHg.....	74 mmHg or below.
32 mmHg.....	73 mmHg or below.
33 mmHg.....	72 mmHg or below.

Arterial pCO <sub>2</sub>	and arterial pO <sub>2</sub>
34 mmHg.....	71 mmHg or below.
35 mmHg.....	70 mmHg or below.
36 mmHg.....	69 mmHg or below.
37 mmHg.....	68 mmHg or below.
38 mmHg.....	67 mmHg or below.
39 mmHg.....	66 mmHg or below.
40-49 mmHg.....	65 mmHg or below.
Above 50 mmHg.....	Any value.

For arterial blood gas studies performed at test locations above 3,000 feet above sea level:

Arterial pCO <sub>2</sub>	and arterial pO <sub>2</sub>
25 mmHg or below.....	75 mmHg or below.
26 mmHg.....	74 mmHg or below.
27 mmHg.....	73 mmHg or below.
28 mmHg.....	72 mmHg or below.
29 mmHg.....	71 mmHg or below.
30 mmHg.....	70 mmHg or below.
31 mmHg.....	69 mmHg or below.
32 mmHg.....	68 mmHg or below.
33 mmHg.....	67 mmHg or below.
34 mmHg.....	66 mmHg or below.
35 mmHg.....	65 mmHg or below.
36 mmHg.....	64 mmHg or below.
37 mmHg.....	63 mmHg or below.
38 mmHg.....	62 mmHg or below.
39 mmHg.....	61 mmHg or below.
40-49 mmHg.....	60 mmHg or below.
Above 50 mmHg.....	Any value.

**APPENDIX C TO PART 79—RADIATION EXPOSURE COMPENSATION ACT OFFSET WORKSHEET—ONSITE PARTICIPANTS**

(1) Year	(2) Payment	(3) X	(4) (Present CPI / Past CPI)	(5) = Inflated P.V.
1960.....		X	( / 29.6)	=
1961.....		X	( / 29.9)	=
1962.....		X	( / 30.2)	=
1963.....		X	( / 30.6)	=
1964.....		X	( / 31.0)	=
1965.....		X	( / 31.5)	=
1966.....		X	( / 32.4)	=
1967.....		X	( / 33.4)	=
1968.....		X	( / 34.8)	=
1969.....		X	( / 36.7)	=
1970.....		X	( / 38.8)	=
1971.....		X	( / 40.5)	=
1972.....		X	( / 41.8)	=
1973.....		X	( / 44.4)	=
1974.....		X	( / 49.3)	=
1975.....		X	( / 53.8)	=
1976.....		X	( / 56.9)	=
1977.....		X	( / 60.6)	=
1978.....		X	( / 65.2)	=
1979.....		X	( / 72.6)	=
1980.....		X	( / 82.4)	=
1981.....		X	( / 90.9)	=
1982.....		X	( / 96.5)	=
1983.....		X	( / 99.6)	=
1984.....		X	( / 103.9)	=
1985.....		X	( / 107.6)	=
1986.....		X	( / 109.6)	=
1987.....		X	( / 113.6)	=
1988.....		X	( / 118.3)	=
1989.....		X	( / 124.0)	=
1990.....		X	( / 130.7)	=
XXXX.....		X	( / )	=
Total of Column (5) equals "Actuarial present value" of past payments.....				
Subtract total of Column (5) from \$75,000 net claim owed to claimant.....				

Dated: March 24, 1992.

William P. Barr,

Attorney General.

[FR Doc. 92-8226 Filed 4-9-92; 8:45 am]

BILLING CODE 4410-01-M

**DEPARTMENT OF THE INTERIOR****Office of Surface Mining Reclamation and Enforcement****30 CFR Part 700****Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Termination of Jurisdiction**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Notice of reinstatement of suspended rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) of the United States Department of the Interior (DOI) is reinstating a suspended rule that was upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *NWF v. Lujan II*. This rule had been suspended by OSM in response to the decision issued by the U.S. District Court for the District of Columbia in *NWF v. Lujan I*. The rule clarified the circumstances whereby a regulatory authority may terminate regulatory jurisdiction under a regulatory program approved under the Surface Mining



Control and Reclamation Act of 1977 (the Act) for the reclaimed sites of completed surface coal mining and reclamation operations.

**EFFECTIVE DATE:** May 11, 1992.

**FOR FURTHER INFORMATION CONTACT:** Daniel Stocker, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 208-2550 (Commercial) or 268-2550 (FTS).

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Discussion of Reinstated Rule
- III. Procedural Matters

**I. Background**

On November 2, 1988 (53 FR 44356), OSM promulgated the termination of jurisdiction rule at 30 CFR 700.11(d) which sets forth the circumstances under which regulatory jurisdiction could be terminated or reasserted over the sites of reclaimed surface coal mining and reclamation operations. As noted in the preamble to that rule, the general procedure among State regulatory authorities has been to terminate regulatory jurisdiction upon the final release of a performance bond for a complete surface coal mining and reclamation operation, or where no bond was required, upon a finding that all reclamation had been successfully completed. In the rulemaking, OSM had decided to codify this long standing practice, and thereby establish a uniform standard, to clarify for regulatory authorities, the coal industry, and the public, the point in time at which regulatory jurisdiction could be terminated and the circumstances and methods under which a regulatory authority must reassert jurisdiction, and the standard OSM would use to review such terminations. (52 FR 44356.)

This rule was challenged and subsequently suspended on June 3, 1991 (53 FR 25036), in response to a decision rendered by the U.S. District Court for the District of Columbia in *National Wildlife Federation, et al., v. Manuel Lujan, Jr., et al.*, No. 88-3345 (D.D.C. August 30, 1990) (*NWF v. Lujan I*).

The suspension notice noted that it was not intended to affect the right of the Secretary of the Interior to appeal the district court's decision. (56 FR 25036.) The Secretary appealed and on December 10, 1991, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision which upheld the suspended rule. *National Wildlife Federation, et al. v. Manuel Lujan, Jr., et al.*, No. 90-5352 consolidated (D.C. Cir. 1991) (*NWF v. Lujan II*). As explained in

detail under the following heading, II. Discussion of Reinstated Rule, this notice reinstates the suspended rule which the court of appeals upheld.

OSM will interpret the reinstated rule in accordance with the court of appeal's decision in *NWF v. Lujan II*, the notice of final rulemaking under which the rule originally was promulgated and this reinstatement notice.

**II. Discussion of Reinstated Rule**

*Section 700.11(d) Termination of Jurisdiction*

OSM is reinstating paragraph (d) of 30 CFR 700.11 as promulgated on November 2, 1988 (53 FR 44356), which sets forth the circumstances whereby a regulatory authority may terminate jurisdiction on surface coal mining and reclamation operation and the circumstances and methods under which a regulatory authority must reassert jurisdiction over such operation.

Section 700.11 (d)(1) and (d)(1)(i) provide that the regulatory authority may terminate its jurisdiction under the regulatory program over a reclaimed site at an initial program surface coal mining and reclamation operation, or increment thereof, if the regulatory authority determines in writing that all requirements imposed under the initial program regulations at 30 CFR chapter VII, subchapter B had been successfully completed.

Section 700.11 (d)(1) and (d)(1)(ii) provide that a regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a permanent program surface coal mining and reclamation operation, or increment thereof, if the regulatory authority determines in writing that all requirements imposed under the applicable regulatory program had been successfully completed, or where a performance bond was required, final release of the bond has occurred.

Section 700.11(d)(2) defines the circumstances that would require a State regulatory authority to reassert jurisdiction over a site of a surface coal mining and reclamation operation because a prior (d)(1) termination of jurisdiction was found to be the result of fraud, collusion, or a misrepresentation of a material fact.

In its digest of the district court decision the D.C. court of appeals noted that the National Wildlife Federation (NWF) claimed that it was "premature" to terminate regulatory jurisdiction at the time of bond release. The district court interpreted NWF's complaint not simply as an objection to timing, but an attack on the concept of terminating

jurisdiction. In striking down the termination of jurisdiction provisions of § 700.11(d), the district court read the enforcement requirements of section 521 (a)(1) and (a)(2) of the Act as imposing "an ongoing duty \* \* \* to correct violations \* \* \* without limitation." That court also believed that allowing termination of jurisdiction would "hinder" the Act's goal of protecting the environment. Accordingly, the court believed it proper to interpret Congress' silence on the precise question of termination of jurisdiction as a call for perpetual regulation. *NWF v. Lujan II*, slip op. at 6.

In upholding section 700.11(d), the court of appeals stated "(t)he district court's opinion and NWF's claim of prematurity suffer from the same flaw. Section 521 cannot be read to express or assume that regulatory jurisdiction over a surface coal mining and reclamation operation must continue forever." *Id.* at 6-7.

The court of appeals noted that "(b)ecause the Act does not evince a clear congressional intent on the issue of whether regulatory jurisdiction may terminate, the question becomes whether the Secretary's regulation is based on a permissible interpretation of the Act." The court held that the effect of the regulation comports with the statutory scheme "in light of the language of the regulation and the interpretation provided in both the preamble and the Secretary's brief \* \* \*." *Id.* at 8-9.

The court held that "the regulation itself clearly speaks to the concerns voiced by the district court and NWF. '(T)he regulatory authority shall reassert jurisdiction if \* \* \* the bond release \* \* \* was based upon fraud, collusion, or misrepresentation.' 30 CFR 700.11(d)(2) (emphasis added)." *Id.* The court also held that the regulation "strikes a reasonable balance between the gradual increase, due to improving technology, in what legitimately may be demanded of an operator, and an operator's need for certainty regarding closed sites." *Id.* at 10.

**III. Procedural Matters**

*Administrative Procedure Act*

Good cause exists under 5 U.S.C. 553(b) of the Administrative Procedure Act that this reinstatement be published without the general opportunity for notice and comment otherwise required by this section. As discussed above, the present document merely reinstates provisions previously remanded by the D.C. District Court but later upheld by



the D.C. Circuit Court of Appeals. The requisite opportunity for notice and comment for the reinstated provisions was provided in the 1987 proposed rulemaking for 30 CFR 700.11(d) at 52 FR 24092.

#### *Effect of Reinstatement in Federal Program States and on Indian Lands*

The reinstated rule applies through cross-referencing in those States with Federal programs and on Indian lands. The States with Federal programs are California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively.

The reinstated rule applies on Indian lands through cross-referencing in the Federal program for Indian lands at 30 CFR part 750.

#### *Effect on State Programs*

Following reinstatement of this rule, OSM will evaluate permanent State regulatory programs approved under section 503 of the Act to determine whether any changes in these programs will be necessary. If the Director determines that certain State provisions should be amended in order to be made no less effective than the reinstated rule, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

#### *Executive Order 12291*

The DOI has examined this notice of reinstatement according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis. The promulgation in 1988 of this rule being reinstated was not a major action and for the same reasons, neither is this reinstatement.

#### *Regulatory Flexibility Act*

The DOI also has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the reinstatement will not have significant economic impact for the same reasons that promulgation of the rule in 1988 did not have such an impact.

#### *Federal Paperwork Reduction Act*

The collection of information contained in this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029-0094. Public reporting burden of this information is estimated to average one

hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Information Collection Clearance Officer, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

#### *National Environmental Policy Act*

The effect of the regulation being reinstated by this notice is covered in an Environmental Assessment (EA) prepared by the DOI. This is the EA prepared prior to promulgation of the November 2, 1988, final rule at 30 CFR 700.11(d) (referenced at 53 FR 44356). This document is on file at the OSM Administrative Record, room 5131, 1100 L Street, NW., Washington, DC 20240.

#### *Author*

The author of this notice of reinstatement is John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone (202) 208-2550 (Commercial) or 268-2550 (FTS).

#### *List of Subjects in 30 CFR Part 700*

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR part 700 is amended as set forth below:

Dated: February 28, 1992.

Harry M. Snyder,

Director, Office of Surface Mining Reclamation and Enforcement.

#### **SUBCHAPTER A—GENERAL**

#### **PART 700—GENERAL**

1. The authority citation for part 700 continues to read as follows:

Authority: Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34.

#### **§ 700.11 [Amended]**

2. Section 700.11(d) is reinstated in full.

[FR Doc. 92-8294 Filed 4-9-92; 8:45 am]

BILLING CODE 4310-05-M

#### **DEPARTMENT OF EDUCATION**

#### **34 CFR Part 222**

RIN 1810-AA20

#### **Assistance for Local Educational Agencies in Areas Affected by Federal Activities and Arrangements for Education of Children Where Local Educational Agencies Cannot Provide Suitable Free Public Education**

**AGENCY:** Department of Education.

**ACTION:** Final Regulations.

**SUMMARY:** The Department amends the regulations governing section 2 of Public Law 81-874, the Impact Aid maintenance and operations assistance program law. These final regulations implement an amendment made to Public Law 81-874 by section 722(a) of the Excellence in Mathematics, Science and Engineering Education Act of 1990, Public Law 101-589, which added section 2(f) to Public Law 81-874. These provisions will affect the amount of a school district's payment under section 2 of Public Law 81-874.

**EFFECTIVE DATE:** These regulations take effect either 45 days after publication in the *Federal Register* or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the *Federal Register*.

#### **FOR FURTHER INFORMATION CONTACT:**

Mr. Charles Hansen, Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, SW., room 2077, Washington, DC 20202-6244. Telephone: (202) 401-3637. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 (in the Washington, DC 202 area code, telephone 708-9300) between 8 a.m. and 7 p.m., Eastern time.

#### **SUPPLEMENTARY INFORMATION:**

#### **Background**

Public Law 81-874, as amended, 20 U.S.C. 236 through 241-1 and 242 through 244, known as the Impact Aid maintenance and operations assistance program law, authorizes payments to local educational agencies (LEAs) that are financially burdened by a reduced local real property tax base resulting from the Federal acquisition of real property or by an increased student population due to Federal activities. Section 2 of the law authorizes payments to certain LEAs that experience financial burdens due to the



Federal acquisition, generally since 1938, of real property within the school districts. Regulations governing the Impact Aid maintenance and operations assistance program are found at 34 CFR part 222.

On November 11, 1990, the President signed into law the Excellence in Mathematics, Science and Engineering Education Act of 1990, Public Law 101-589. Section 722(a) of Public Law 101-589, which adds paragraph (f) to section 2 of Public Law 81-874, creates an exception to one of the general section 2 eligibility requirements. Under that general eligibility requirement (section 2(a)(1)(C) of Pub. L. 81-874), the United States must have acquired, in the aggregate, at least 10 percent of the total assessed value of real property within a school district since 1938 for the district to qualify for section 2 assistance. New section 2(f) permits a school district to meet this eligibility requirement if the school district (1) as demonstrated by written evidence from the United States Forest Service, satisfactory to the Secretary, contains between 50,000 and 55,000 acres of land that has been acquired by the Forest Service between 1915 and 1990, and (2) serves a county chartered by State law in 1875.

These final regulations implement this eligibility exception with respect to both regular and consolidated LEAs. In addition, the regulations clarify that both the eligibility and entitlement under section 2 of a school district that meets this eligibility exception will be calculated based upon federally owned, tax-exempt land that was acquired by the Forest Service between 1915 and 1990, as well as the generally eligible federally owned tax-exempt real property acquired by the United States after 1938.

On September 13, 1991, the Department published a notice of proposed rulemaking (NPRM) for this amendment in the *Federal Register*. The NPRM includes a specific explanation of the changes being made by this final regulation 56 FR 46670-46671 (September 13, 1991). There are no differences between that NPRM and these final regulations.

#### Public Comment

In the NPRM the Secretary invited comments on the proposed regulations. The only comment the Secretary received suggested that the section 2 eligibility exception implemented by these regulations was too strict for some local educational agencies to meet, in that the number of required acres of United States Forest Service land was too high. However, the Department is not legally authorized to make any

change to respond to this comment under the applicable statutory authority. The Secretary has made no changes in these regulations since publication of the NPRM.

#### Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in that order.

#### Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

#### List of Subjects in 34 CFR Part 222

Education, Education of the handicapped, Elementary and secondary education, Federally affected areas, Grant program—education, Public housing.

(Catalog of Federal Domestic Assistance Number 84.041, Impact Aid—Maintenance and Operations.)

Dated: March 20, 1992.

David Kearns,

Deputy Secretary of Education.

The Secretary amends part 222 of title 34 of the Code of Federal Regulations as follows:

#### **PART 222—ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES AND ARRANGEMENTS FOR EDUCATION OF CHILDREN WHERE LOCAL EDUCATIONAL AGENCIES CANNOT PROVIDE SUITABLE FREE PUBLIC EDUCATION**

1. The authority citation for part 222 continues to read as follows:

Authority: 20 U.S.C. 238-241-1 and 242-244, unless otherwise noted.

2. Section 222.91 is amended by adding, in alphabetical order, a new definition of "Eligible Federal property", and revising the authority citation, to read as follows:

#### **§ 222.91 What definitions apply to this subpart?**

\* \* \* \* \*

#### *Eligible Federal Property*

The term means section 2 "Federal property" as defined in § 222.3, that meets the following additional requirements:

(1) For LEAs that are eligible under the general 10 percent requirement in § 222.94(a)(1) or, if based upon former

districts, in § 222.102(b)(1)(ii)(A), only Federal property that—

(i) The United States has acquired since 1938; and

(ii) Was not acquired by exchange for other Federal property that the United States owned within the school district before 1939.

(2) For LEAs that are eligible under the eligibility exception in § 222.94(a)(2) or, if based upon former districts, in § 222.102(b)(1)(ii)(B), only Federal property that—

(i)(A) The United States has acquired since 1938; and

(B) Was not acquired by exchange for other Federal property that the United States owned within the school district before 1939; or

(ii) Is land acquired by the United States Forest Service between 1915 and 1990.

(Authority: 20 U.S.C. 237 (a) and (f))

3. Section 222.94 is amended by revising paragraph (a), revising the first sentence of paragraph (c), by revising paragraph (d) introductory text and paragraphs (d)(1) introductory text and (d)(2) introductory text, and revising the authority citation to read as follows:

#### **§ 222.94 What criteria must be met regarding Federal acquisition of real property in a school district?**

(a) For an LEA to be eligible to receive financial assistance under section 2, the LEA must meet the following criteria:

(1) The United States must own or acquire "eligible Federal property," as that term is defined in § 222.91, within the school district of the LEA, that has an aggregate assessed value of 10 percent or more of the assessed value of all real property in the school district, based upon the assessed values of the eligible Federal property and of all real property (including that Federal property) on the date or dates of acquisition of the eligible Federal property; or

(2) Beginning with fiscal year 1991, the school district of the LEA—

(i) As demonstrated by written evidence from the United States Forest Service satisfactory to the Secretary, contains between 50,000 and 55,000 acres of land that has been acquired by the United States Forest Service between 1915 and 1990; and

(ii) Serves a county chartered by State law in 1875.

\* \* \* \* \*

(c) If, during any fiscal year, the United States sells, transfers, is otherwise divested of ownership of, or relinquishes an interest in or restriction on, Federal property upon which an



LEA's eligibility is based, the Secretary redetermines the LEA's eligibility for the following fiscal year, based upon the remaining eligible Federal property, in accordance with paragraph (a) of this section. \* \* \*

(d) Except as provided under paragraph (a)(2) of this section, the Secretary's determinations and redeterminations of eligibility under this section are based on the following documents:

(1) For an initial determination of eligibility under paragraph (a) of this section for a new section 2 applicant or newly acquired eligible Federal property, only upon—

(2) For a redetermination of an LEA's eligibility under paragraph (c) of this section, only upon—

(Authority: 20 U.S.C. 237(a)(1), (e), and (f))

4. Section 222.95 is amended by revising paragraph (a) to read as follows:

**§ 222.95 What constitutes a substantial and continuing financial burden?**

(a) An LEA is eligible to receive section 2 assistance only if acquisition of the eligible Federal property places a substantial and continuing financial burden on the LEA.

5. Section 222.96 is amended by revising the introductory text and by revising paragraph (a) to read as follows:

**§ 222.96 When is an LEA not substantially compensated from Federal activity?**

An LEA is eligible to receive section 2 assistance only if the LEA is not being substantially compensated, by increases in local revenue from Federal activities with respect to the eligible Federal property in the school district, for the loss of local revenue resulting from Federal acquisition of that real property. The Secretary considers that an LEA is being substantially compensated by increases in local revenue from the carrying on of Federal activities with respect to the eligible Federal property if—

(a) The LEA receives new or increased local revenue that is generated directly from the eligible Federal property or activities in or on that property; and

6. Section 222.98 is amended by revising paragraph (a) to read as follows:

**§ 222.98 How is an LEA's section 2 maximum entitlement determined?**

(a) In accordance with § 222.99, the Secretary first establishes an estimate of what the total assessed value of the eligible Federal property would be if it were on the tax rolls in the fiscal year for which assistance is sought ("estimated current assessed value"), based on the classification, character, and condition of that property as it was when acquired by the United States. The Secretary does not include in this figure any estimated current assessed value for improvements or other changes made in or on the eligible Federal property after the Federal acquisition.

**§ 222.99 [Amended]**

7. In § 222.99, revise the words "Federal property" to read "eligible Federal property" each time they appear in the heading, paragraphs (b) introductory text, (b)(1) introductory text, (b)(1)(i), (b)(1)(ii), (b)(2) introductory text, (b)(2)(iii), (b)(3) introductory text, (b)(3)(i), (b)(3)(ii)(A), and (b)(3)(ii)(B), and revise the authority citation to read "(Authority: 20 U.S.C. 237 (a) and (f))".

8. Section 222.101 is amended by revising paragraph (a) to read as follows:

**§ 222.101 How is an LEA's section 2 need-based entitlement determined?**

(a) The Secretary divides the total estimated current assessed value established under § 222.98(a) by the sum of that estimated current assessed value and the actual current assessed value of all other real property within the school district of the applicant.

9. Section 222.102 is amended by revising paragraphs (b)(1) (i) and (ii), the introductory text of paragraph (c), paragraphs (c)(1) and (c)(2)(i), and the authority citation to read as follows:

**§ 222.102 How are section 2 eligibility and entitlement determined for an LEA formed by consolidation of school districts?**

(b) \* \* \*

(i) At the time of consolidation contained some eligible Federal property; and

(ii) For the year of application—

(A) Contains within its former boundaries eligible Federal property, that has an aggregate assessed value of 10 percent or more of the assessed value of all real property (including the eligible Federal property) in the former school district, based upon the assessed values of the eligible Federal property and of all real property (including that

Federal property) on the date or dates of acquisition of the eligible Federal property; or

(B) Beginning with fiscal year 1991, meets the description in § 222.94(a)(2); and

(c) *Entitlement.* Except as otherwise limited by law or the amount of appropriated funds, an LEA that meets the eligibility criteria in paragraph (b) of this section on the basis of a former school district is entitled to financial assistance under section 2 in an amount equal to the lesser of the maximum entitlement or the need-based entitlement, which are determined as follows:

(1) For each former school district meeting the eligibility criteria in paragraph (b)(1) of this section, the Secretary determines a maximum entitlement figure in accordance with § 222.98. If more than one former school district is eligible, the Secretary combines the maximum entitlement figures for all eligible former school districts within the LEA to determine the LEA's total maximum entitlement.

(2) \* \* \*

(i) Dividing the total estimated current assessed value for all eligible Federal property meeting the criteria in paragraph (b)(1)(ii) of this section, that is within former school districts meeting the criteria in paragraph (b)(1) of this section, by the sum of that estimated current assessed value and the actual current assessed value of all other real property within the consolidated LEA; and

(Authority: 20 U.S.C. 237 (c) and (f)(5))

[FR Doc. 92-8193 Filed 4-9-92; 8:45 am]

BILLING CODE 4000-01-M

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

[MM Docket No. 89-429; RM-6874; RM-7206; RM-7256]

**Radio Broadcasting Services; Wellington, Wichita and Andover, KS**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects a final rule adopted in this proceeding, 57 FR 11432, April 3, 1992, to include the opening of a filing window for the allotment of Channel 230C3 at Andover, Kansas.



**DATES:** Effective May 15, 1992. The window period for filing applications for Channel 230C3 at Andover will open on May 18, 1992, and close on June 18, 1992.

**FOR FURTHER INFORMATION CONTACT:**

Michael Ruger, Mass Media Bureau,  
(202) 634-6530.

Federal Communications Commission.

Michael C. Ruger,

Acting Chief, Allocations Branch, Policy and  
Rules Division, Mass Media Bureau.

[FR Doc. 92-8344 Filed 4-9-92; 8:45 am]

BILLING CODE 6712-01-M



# Proposed Rules

Federal Register

Vol. 57, No. 70

Friday, April 10, 1992

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 92-NM-36-AD]

#### Airworthiness Directives; Boeing Model 747 Series Airplanes

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 747 series airplanes. This proposal would require repetitive inspections to detect cracks in various areas of the fuselage internal structure, and repair, if necessary. This proposal is prompted by results of fatigue tests that identified areas of the fuselage internal structure where fatigue cracks have occurred. The actions specified by the proposed AD are intended to prevent loss of the structural integrity of the fuselage.

**DATES:** Comments must be received by June 2, 1992.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-36-AD, 1601 Lind Avenue SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington.

**FOR FURTHER INFORMATION CONTACT:** Mr. Steven C. Fox, Aerospace Engineer, Airframe Branch, ANM-120S, Seattle

Aircraft Certification Office, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (206) 227-2777; fax (206) 227-1181.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 92-NM-36-AD." The postcard will be date stamped and returned to the commenter.

##### Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-103, Attention: Rules Docket No. 92-NM-36-AD, 1601 Lind Avenue SW., Renton, Washington 98055-4056.

##### Discussion

The manufacturer has recently conducted a structural review of the Model 747. The FAA participated in this review, as well as the Boeing Model 747 Structures Working Group (SWG), a team established as a result of the efforts of the Airworthiness Assurance Task Force. Results of recent extended pressure fatigue tests completed on a

Boeing Model 747-100SR series airplane above 22,000 pressure cycles have confirmed areas of the fuselage internal structure where frame fatigue cracks have occurred in service or are likely to occur. To ensure the structural integrity of the fuselage frame beyond the design life of the airplane, and to detect the subject fatigue cracking in a timely manner, the SWG has recommended that inspections for fuselage frame fatigue cracks in most of the affected areas be accomplished on airplanes that have accumulated 22,000 flight cycles. In the Section 46 upper lobe frames, the SWG has recommended that these inspections be accomplished on airplanes that have accumulated 25,000 flight cycles because cracks have appeared in this area somewhat later than in the other affected areas. Failure to detect and repair cracks, as necessary, could lead to the inability to withstand fail-safe loads, and reduced structural integrity of the fuselage.

The FAA has reviewed and approved Boeing Service Bulletin 747-53-2349, dated June 27, 1991, that describes procedures for repetitive close internal visual inspections to detect cracks in various areas of the fuselage internal structure, and repair, if necessary.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require repetitive close internal visual inspections to detect cracks in various areas of the fuselage internal structure, and repair, if necessary. The actions would be required to be accomplished in accordance with the service bulletin described previously.

There are approximately 610 Boeing Model 747 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 181 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1,746 work hours per airplane to accomplish the proposed actions, and that the average labor rate is \$55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be \$17,381,430.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the



various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES."

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

**Boeing:** Docket 92-NM-36-AD.

**Applicability:** Model 747 series airplanes; as listed in Boeing Service Bulletin 747-53-2349, dated June 27, 1991; certificated in any category.

**Compliance:** Required as indicated, unless accomplished previously. To prevent loss of the structural integrity of the fuselage, accomplish the following:

(a) Prior to the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, unless previously accomplished within the last 2,000 flight cycles; and thereafter at intervals not to exceed 3,000 flight cycles: Perform a detailed visual internal inspection to detect cracks in the areas of the fuselage internal structure listed below, in accordance with Boeing Service Bulletin 747-53-2349, dated June 27, 1991; and prior to further flight, repair any cracks detected, in accordance with FAA-approved procedures.

- (1) Sections 41 and 42 upper deck floor beams.
- (2) Section 42 upper lobe frames.
- (3) Section 46 lower lobe frames.

(4) Section 42 lower lobe frames.

(5) Main entry door cutouts.

(6) Section 41 body station 260, 340, and 400 bulkheads.

(7) Main entry doors.

(b) Prior to the accumulation of 25,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever occurs later, unless previously accomplished within the last 2,000 flight cycles; and thereafter at intervals not to exceed 3,000 flight cycles: Perform a detailed visual internal inspection to detect cracks in the Section 46 upper lobe frames, in accordance with Boeing Service Bulletin 747-53-2349, dated June 27, 1991; and prior to further flight, repair any cracks detected, in accordance with FAA-approved procedures.

(c) An alternative method of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. The request shall be forwarded through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Seattle ACO.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on April 1, 1992.

**David G. Hmiel,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 92-8315 Filed 4-9-92; 8:45 am]

BILLING CODE 4910-13-M



## Notices

Federal Register

Vol. 57, No. 70

Friday, April 10, 1992

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### ACTION

#### Information Collection Request Under Review

##### AGENCY: ACTION.

**SUMMARY:** Under the Paperwork Reduction Act (44 U.S.C., chapter 35), the Office of Management and Budget (OMB) reviews and acts upon proposals to collect information from the public or to impose recordkeeping requirements. ACTION has submitted three copies of the attached information collection proposal to OMB. This proposal amends and supersedes an earlier announcement which appeared in the *Federal Register* (FR) on March 18, 1992, and extends the deadline for comment to April 24, 1992. OMB and ACTION will consider comments on the proposed collection of information and recordkeeping requirements including all comments received regarding the previous FR announcement. ACTION is requesting an expedited review by OMB with final action by April 24, 1992.

**DATES:** OMB and ACTION will consider comments received by two weeks from the date of publication. Comments are to be directed to both of the following addresses:

Janet Smith, ACTION Clearance Officer,  
ACTION, 1100 Vermont Avenue, NW.,  
Washington, DC 20525, Telephone  
(202) 606-5245.

Daniel Chenok, Desk Officer for  
ACTION, Office of Management and  
Budget, 3200 New Executive Office  
Bldg., Washington, DC 20503.

##### SUPPLEMENTARY INFORMATION:

*Office of Action Issuing Proposal:*  
Equal Opportunity Staff  
*Title of Form:* Handicap Accessibility  
Self-Evaluation Checklist

*Need and Use:* Section 504 of the Rehabilitation Act of 1973, as amended, prohibits discrimination on the basis of disability by recipients of Federal financial assistance. Section 417 of the Domestic Volunteer Service Act, Public

Law 93-113, defines recipient of Federal financial assistance as any place a volunteer is assigned under one of ACTION's programs. Regulations implementing section 504 (45 CFR 1232.7(c)) require that recipients of Federal financial assistance determine if physical barriers in facilities or programmatic barriers cause discrimination against individuals with disabilities by preventing or interfering with their participation in programs conducted by the particular recipient. This nonmandatory checklist included in a revision of the ACTION Handicap Accessibility Guidebook (Directive 240), is one way by which a recipient may conduct its handicap accessibility self-evaluation. Although prior versions of this guidebook required the use of the ACTION checklist or a similar Federal survey, recipients may use alternative Federal or State procedures in order to comply with these regulations. Further, any recipient which has already completed the self-evaluation is not required to conduct a new self-evaluation.

With this amendment to the FR notice of 3/18, ACTION is recommending that a copy of the documentation on work station/site self-evaluations and transition plans be submitted to the OAVP sponsor or VISTA project so the sponsor or project can more easily determine the accessibility of the program when viewed in its entirety. The "Handicap Accessibility Self-Evaluation Certification" is the only form required by ACTION to be completed by the OAVP sponsors and work stations as well as VISTA projects and sites. Each OAVP work station and VISTA site must submit this form to its sponsor or project. The OAVP sponsor or VISTA project then submits a form to its ACTION State program office for the entire program.

*Type of Request:* Existing collection in use without an OMB control number.

*Frequency of Collection:* Non-recurring.

*General Description of Respondents:* ACTION sponsors and stations.

*Estimated Number of Responses:* 54,000.

*Estimated Annual Reporting or Disclosure Burden:* 108,000 hours.

Dated: April 7, 1992.

Jane A. Kenny,

Director, ACTION.

#### Handicap Accessibility Checklist

##### A. Program Accessibility

##### B. Building and Site Accessibility

This checklist is presented as a guide to identify physical barriers that might restrict program access to individuals with disabilities. Use of this checklist is not mandatory. The building/site criteria are based on the Uniform Federal Accessibility Standards (UFAS) and specific citations are provided. If you answer "No" to any of the questions, it does not necessarily mean noncompliance because other methods of providing program access may be used.

This checklist is available on audio cassette or in large print from ACTION, Equal Opportunity Director, 1100 Vermont Avenue, NW., Washington, DC 20525-(202 606-4812 (voice)), (202 606-5258 (TDD)).

#### Program Accessibility Suggestions for a Self-Evaluation

##### Background

A grantee may not deny the benefits of its programs, activities, and services to individuals with disabilities because its facilities are inaccessible. A grantee's services, programs, or activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. This standard, known as "program accessibility," applies to all existing facilities of a grantee. Grantees, however, are not necessarily required to make each of their existing facilities accessible.

Grantees may achieve program accessibility by a number of methods. In many situations, providing access to facilities through structural methods, such as alteration of existing facilities and acquisition or construction of additional facilities, may be the most efficient method of providing program accessibility. A grantee may, however, pursue alternatives to structural changes in order to achieve program accessibility. Nonstructural methods include acquisition or redesign of equipment, assignment of aides to beneficiaries, and provision of services at alternate accessible sites.

A self-evaluation is a grantee's assessment of its current policies and practices to determine whether there are obstacles to the grantee's program or activities. The self-evaluation identifies and corrects those policies and practices that are inconsistent with section 504 requirements. As part of the self-evaluation, a grantee should:

1. Identify all of the grantee's programs, activities, and services; and



2. Review all the policies and practices that govern the administration of the grantee's programs, activities, and services.

Normally, a grantee's policies and practices are reflected in its regulation, administrative manuals or guides, policy directives, and memoranda. Other practices, however, may not be recorded and may be based on custom.

Once a grantee has identified its policies and practices, it should analyze whether these policies and practices adversely affect the full participation of individuals with disabilities in its programs, activities and services. In this regard, a grantee should be mindful that although its policies and practices may appear harmless, they may result in denying individuals with disabilities the full participation of its programs, activities, or services. Listed below are several areas a grantee should consider when conducting its self-evaluation.

**Element 1: Participation of Individuals With Disabilities in the Self-Evaluation Process** (see TAG-88-9)<sup>1</sup>:

A. Are individuals with disabilities and other interested persons involved in the self-evaluation process?

B. Is the general public involved in the self-evaluation process?

**Element 2: Policies and Practices That Limit the Participation of Individuals With Disabilities in the Organization's Programs and Activities**

Consider your organization's formal and informal program eligibility and admission criteria or licensing standards. Particular attention should be paid to policies incorporating or establishing:

- Physical or mental fitness or performance requirements;
- Safety standards;
- Testing requirements;
- Educational requirements;
- Work experience requirements;
- Requirements based on disability;
- Requirements that prohibit participation because of disability; and
- Insurability requirements.

Do any of these standards or requirements have the direct or indirect effect of excluding or limiting the participation of individuals with disabilities in your organization's programs or activities?

Which of these standards or requirements will be altered or eliminated to allow participation by individuals with disabilities? How will your organization communicate these changes to your organization's staff and the public?

Which of these standards or requirements will be retained by your organization? What is your organization's justification for their retention?

<sup>1</sup> Copies of Technical Assistance Guides (TAG's), which provide detailed technical implementation information, are available from the Coordination and Review Section, Civil Rights Division, U.S. Department of Justice, Washington, DC 20530, (202) 207-2222 (voice) or (202) 307-7878 (TDD). While TAG's may be helpful in gaining detailed knowledge of an area of accessibility, they are not necessary for completing this survey.

**Element 3: Information and Training for Staff**

What staff members need to be aware of your organization's obligations and policies which enable individuals with disabilities to participate in your organization's programs or activities?

How has your organization informed/trained these staff members?

**Element 4: Use of Contractors**

Does your organization use contractors to conduct programs or activities on behalf of your organization that are designed to provide services to your organization's beneficiaries? [If not, go to next element.]

How does your organization ensure both contractors and your organization's procurement officials are aware of their obligations to facilitate participation of individuals with disabilities in programs or activities contractors operate on behalf of your organization?

How does your organization monitor fulfilling this obligation?

**Element 5: Transportation**

Does your organization provide transportation to volunteers, beneficiaries, visitors, etc.? [If not, go to next element.]

What procedures does your organization follow to make transportation accessible to persons with mobility, visual, and hearing impairments?

**Element 6: Telephone Communications**

How does your organization communicate telephonically with hearing impaired individuals?

**Element 7: Documents and Publications**

How does your organization make documents and publications readily accessible to and usable by visually impaired persons? Does your organization use audiotape, large print, Braille, computer disk or something else?

Does your organization portray individuals with disabilities in your organization's documents and in publications?

**Element 8: Meetings**

Does your organization require that meetings, hearings, and conferences be held, upon request, in accessible locations?

Are interpreters, readers, and/or adaptive equipment provided in an expeditious manner, when requested, for meetings, interviews, conferences, public appearances by organization officials, and hearings?

Does your organization ensure that individuals with hearing impairments who do not read sign language can participate effectively in meetings, conferences, and hearings via assistive listening devices or other means?

**Element 9: Audio-Visual Presentations**

How does your organization make audio-visual presentations accessible to individuals with visual and hearing impairments?

Does your organization portray individuals with disabilities in audio-visual presentations?

**Element 10: Emergency Evacuation**

What equipment and/or procedures does your organization use to notify individuals

with visual, hearing, and mobility impairments of emergency evacuation procedures?

**Element 11: Accessible Equipment**

In providing services to your beneficiaries, is it necessary for your beneficiaries to use electronic or other types of equipment [such as computer terminals, copying machines, etc.]?

If so, how do you ensure that individuals with disabilities are provided access to and use of such equipment?

**Element 12: Reasonable Accommodation** (45 CFR 1232.10)

**Standard:** A grantee shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified beneficiary of volunteer with a disability unless the grantee can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

Reasonable accommodation may include (1) making facilities used by beneficiaries, or volunteers readily accessible to and usable by individuals with disabilities, and (2) acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions. In determining whether an accommodation would impose an undue hardship on the operation of your program, factors to be considered include:

- (1) The overall size of your organization's program with respect to number of volunteers, number and type of facilities, and size of budget;
- (2) The type of your organization's operation, including the composition and structure of your organization's volunteer force;
- (3) The nature and cost of the accommodation needed.

Does your organization have policies that insure that reasonable accommodation is made to the known physical or mental limitations of an otherwise qualified beneficiary or volunteer with a disability?

**Element 13: Notification**

How does your organization notify all persons (participants, beneficiaries, volunteers, visitors, and other interested parties, including those with impaired vision and/or hearing) of your organization's policy not to discriminate against qualified individuals with disabilities?

How does your organization notify all persons that your meetings, hearings, and conferences will be held in accessible locations and that auxiliary aids will be provided, upon request, to participants with disabilities?

How does your organization notify all persons about how and with whom to file a discrimination complaint on the basis of disability and what procedure are they told to follow?

**Building and Site Accessibility General Information**

Organization Name: \_\_\_\_\_  
Facility Name and Address (with city, state, and zip code): \_\_\_\_\_



Date Reviewed: \_\_\_\_\_  
 Reviewer's Name and Title: \_\_\_\_\_  
 Address (if different from above): \_\_\_\_\_

Phone (including area code): \_\_\_\_\_  
 Programs and Activities Conducted in Facility: \_\_\_\_\_

Purpose of this checklist: This checklist will help you identify physical barriers to program access in existing facilities. It provides guidance about the way building elements should be constructed to achieve maximum accessibility. Completion of the checklist will give you an idea of how far the facility is from the ideal, but failure to meet the standards in the checklist does not, by itself, mean that a building element constitutes a significant problem in terms of program accessibility. Consideration should be given to how great the variation is and what its effect is on the participation of individuals with disabilities in the program. If the effect on access is significant, consideration should be given to making physical changes in the facility or otherwise modifying the program in order to make the program accessible.

This checklist is available on audio cassette or in large print from ACTION, Equal Opportunity Director, 1100 Vermont Avenue, NW, Washington, DC 20525—(202) 606-4812 (voice), (202) 606-5256 (TDD).

Tools needed to conduct evaluation of building and site accessibility: Generally, the only tool necessary to complete this checklist will be a tape measure. This checklist is generally based on the Uniform Federal Accessibility Standards (UFAS), which would be referred to for further information.

#### Element 1: Accessible Route (UFAS 4.1-4.7)

**Need:** People who walk with difficulty or use wheelchairs, crutches, canes or walkers need a wide, smooth, level, and firm surface. Sight-impaired people need a path free of hazards such as low-hanging or protruding objects undetectable by a cane.

1. At least one accessible route connects all parts of facility?
2. Minimum of 36" clear width except at doors?
3. Is there at least a 60" x 80" passing space at reasonable intervals?
4. Minimum of 80" clear headroom?
5. Surface: non-slip, firm and stable?
6. Slope does not exceed 1:20? [If greater than 1:20, apply criteria for ramps and curb ramps.]

7. Are routes not interrupted by 1/4" or more changes in level or steps?

8. Are grates set in the direction of the route not more than 1/2" wide?

9. At least one accessible route from transportation stops, parking, street and/or sidewalks?

Comments: \_\_\_\_\_

#### Element 2: Parking (UFAS 4.6)

**Need:** People with mobility impairments need parking spaces with enough to open car doors fully and get out with a wheelchair or mobility aid, that are close to the building or facility and that are on an accessible route from parking lot to building.

1. If any visitor parking is provided, are spaces reserved for individuals with disabilities? Suggested guideline:

Total parking in lot	Accessible spaces
1-25	1
26-50	2
51-75	3
76-100	4
101-150	5
151-200	6
201-300	7
301-400	8

2. Reserved space(s) located closest to accessible entrance; on accessible route?
3. Is the space(s) at least 96" wide?
4. Access aisle next to space at least 60" wide?
5. Slope of space/access aisle no more than 1:50?
6. Accessibility symbol on space; mounted at a height unobscurable by a vehicle?

Comments: \_\_\_\_\_

#### Element 3: Ramps (UFAS 4.8)

**Need:** People who use wheelchairs need gently sloped ramps with handrails, no drop-offs, and a smooth, stable surface with level top and bottom platforms for resting and turning.

1. Slope is least possible and no more than 1:12?
  2. Cross slope (perpendicular to direction of travel) no more than 1:50?
  3. Surface: non-slip, firm and stable?
  4. Walls, railings or curbs at least 2" high to prevent slipping off ramp?
  5. Level landing is as wide as ramp and at least 60" long at the top and bottom of ramp and at each turn of ramp?
  6. Ramp is at least 36" wide and rises no more than 30"?
- (a) If ramp rise is more than 6" and length is more than 72", are there handrails between 30-34" high which extend 1' beyond top and bottom of ramp?
- (b) Ends and edges rounded smoothly?
- (c) Solidly anchored and with fittings that do not rotate?
- (d) Parallel with slope of ground surface?

Comments: \_\_\_\_\_

#### Element 4: Entrances and Interior Doors (UFAS 4.13 and 4.14)

**Need:** People with mobility impairments need a building entrance which is wide, smooth, level or ramped. Entrance doors must be wide, have adequate space for maneuvering on both the pull and push sides, and require light pressure and no twisting to operate.

1. At least one principle entrance, located on accessible route?
2. Accessible doors are standard single or double-leaf hinged doors, not revolving doors/turnstiles?
3. Is the door width at least 32" (if double doors are used, one must comply)?
4. Is door hardware no higher than 48" and push/pull type or lever operated?
5. Is the maximum opening force 8.5 lbs. on exterior hinged doors (about as much as

needed to open a refrigerator door); 5 lbs. on interior hinged, sliding, or folding doors?

6. Are all thresholds no higher than 1/2" with beveled edge, and a slope no greater than 1:2?

7. Is there adequate maneuvering clearance at doors?

Comments: \_\_\_\_\_

#### Element 5: Elevators (UFAS 4.10)

**Need:** All persons with disabilities benefit from elevators. For maximum usability, elevators must provide adequate maneuvering space, time to get to and enter the cab, be conveniently located, and have marked controls. Blind persons benefit from audible indications on direction of travel and floors, and tactile markings at all controls. Hearing-impaired persons need this information to be visual. Lifts benefit people with mobility impairments; they cannot substitute for elevators in new construction, but they can be a successful solution to existing stairs that cannot be ramped.

1. At least one serves each level on accessible route in a multi-story facility, unless levels are connected by ramps?
2. Is it an automatic self-leveling elevator with reopening devices?
3. Cars dimensions: if door opens in the center, floor at least 51" x 80"; if door opens on one side, floor at least 51" x 68"?
4. Hall call buttons: centered 42" or less from floor and lighted?
5. Car controls: highest control 48", buttons at least 1/4" and marked with raised characters?
6. Door remains open 3 seconds?
7. Visual and audible floor indicators provided?
8. If emergency information systems provided, audible alarms (bells or audible instructions) and visual signals (flashing alarms or written instructions) are used?
9. Automatically corrects over/under-travel within 1/2" when stopping at floor?
10. Door width at least 36"?
11. Floor is firm, stable and non-slip?
12. No more than 1/4" gap between car and landing platform?

Comments: \_\_\_\_\_

#### Element 6: Stairs (UFAS 4.9)

**Need:** People with sight impairments need stairs of uniform tread and width, with handrails which guide them and which indicate landings.

1. Stair step heights are uniform; step depths are at least 11" and uniform?
2. No overhangs on steps greater than 1 1/2"; overhangs are curved?
3. Handrails meet requirements (discussed under ramps)?

Comments: \_\_\_\_\_

#### Element 7: Restrooms (UFAS 4.16-4.26)

**Need:** People with mobility impairments need restrooms that they can get to and use easily and safely. For maximum flexibility, fixtures need adequate clear floor space for close approach and turning. Some individuals require sturdily mounted grab bars for support or transfer. Controls and hardware must be within reach and easily operable.



Hot, sharp, abrasive, or protruding objects are hazards.

1. If there are restrooms, at least one is provided on an accessible route?
2. Entrance door has at least 32" clear opening; lever handle or push/pull type hardware; identified by accessibility symbol?
3. Unobstructed space to allow for wheelchair?
4. Toilet stall doors at least 32" wide?
5. Adequate space for maneuvering in stalls? [Refer to standards for requirements for different configurations.]
6. In stalls, front partition and at least one side partition provide toe clearance of at least 9" above the floor (if depth of the stall is greater than 60" then toe clearance not needed)?
7. Grab bars are 33-36" high; located on back and side of stall; 1 1/4"-1 1/2" diameter; 1 1/2" from wall; support 250 lb. force in any direction at any point; sharp edges/protrusions eliminated?
8. Toilet is 17"-19" high and located maximum 18" from center of toilet to closet wall?
9. For wall-mounted urinal, the basin opening is no more than 17" from floor; elongated rim; clear floor space 30" by 48" in front of urinals?
10. Toilet paper dispenser at least 19" above floor?
11. Sinks: height maximum 34"; drain and hot water pipes insulated; minimum 29" clearance below apron of sink?
12. Faucets: controls mounted no more than 44" above ground; hand-operated or automatic but do not require tight gripping, pinching or twisting of wrist?
13. Where there are mirrors, bottom edge maximum of 40" above floor?
14. Towel dispenser and disposal unit: operable part no more than 40" above floor?

Comments:

*Element 8: Drinking Fountains (UFAS 4.12(9))*

**Need:** Persons in wheelchairs need drinking fountains mounted low so they can reach the spout. They need to be able to pull up under the fountain or along its side. Provision of a paper cup dispenser may be an appropriate alternative. Persons who have difficulty using their hands need controls that can be easily operated.

1. If fountains are available, 50% accessible on each floor; if only one is available, is it on an accessible route?
2. Spout mounted 36" above floor in from of unit with water flow at least 4" high and parallel to front of unit?
3. Controls operable with one hand without grasping or twisting?
4. Wall mounted: bottom of apron to floor at least 27"; built in: at least 39" x 48" in from of fountain?

Comments:

*Element 9: Hazardous Areas and Warning Signals (UFAS 4.1.2 and 4.28)*

**Need:** People with visual impairments need audible emergency warning systems and to be alerted by touch to hazardous areas. Persons with hearing impairments need visual alarms.

1. If warning systems are provided, both visual (flashing) and audible provided?

2. Door knobs to hazardous areas roughened; doors labeled in raised or routed letters?

Comments:

*Element 10: Assembly, Meeting and Conference Areas (UFAS 4.1 and 4.33)*

**Need:** People who use wheelchairs need a level area from which they can view the performance area. Both the seating area and the performance area must be on an accessible route. Persons with hearing impairments need an auxiliary listening system.

1. Wheelchair spaces available? Suggested guideline:

Total capacity	Wheelchair locations
50-75	3
76-100	4
101-150	5
151-200	6
201-300	7
301-400	8

2. Wheelchair locations adjacent to accessible route and, whenever possible, ramped to different seating levels?
3. Performing areas on an accessible route?
4. For large areas, amplification system available (volume controls, wireless headphones, infrared—audio loops and radio frequency acceptable)?

Comments:

*Element 11: Public Telephones (UFAS 4.1.2 and 4.31)*

**Need:** Persons who use wheelchairs need adequate clear floor space to pull up to the telephone and a low mounting height so they can reach all operable parts. Persons with hearing impairments need volume controls.

1. If public telephones, at least one accessible per floor?
2. Located on an accessible route with clear floor space 30" x 48" in front of phone?
3. Highest operable control 48" high for front approach, 54" for parallel approach?
4. Push button controls?
5. Any provision for the hearing impaired?

Comments:

*Element 12: Picnic Areas*

**Need:** Persons in wheelchairs need tables with one end extended or with a portion of a bench removed so that the table legs or benches do not prohibit access. Picnic tables need to be on an accessible route and located on a firm, level surface. Grills and trash receptacles need to be at an accessible height. Grills need to be located on a paved level textured surface, and trash receptacles need to have rounded corners so as not to be a safety hazard to visually-impaired persons.

Comments:

*Element 13: Exhibits, Signs and Information Displays*

**Need:** Persons with disabilities need exhibits, signs and information displays adequately lighted, in high-contrast colors, in large, easy-to-read print, and at levels where the material may be read by short people or

by persons in wheelchairs. Tactile objects allow visually-impaired persons to enjoy exhibits and displays. Audio information should be available to hearing-impaired persons in some other format.

Comments:

*Element 14: Seating, Tables, and Work Areas (UFAS 4.32)*

**Need:** Persons in wheelchairs need seating with flat, clear floor space in front of tables, counters, and work areas, as well as sufficient knee clearance.

Comments:

*Element 15: Other Building Elements and Specialized Facilities*

Other building elements and special use facilities are not covered by these forms. Where access to these elements and facilities is essential for individuals with disabilities are to participate fully in your program or activity.

- Bathing facilities and showers—UFAS 4.23

- Storage facilities—UFAS 4.25

- Windows—UFAS 4.12

- Dwelling units—UFAS 4.34

- Food service facilities—UFAS 5.0

- Health care facilities—UFAS 6.0

- Libraries—UFAS 8.0

- Mercantile—UFAS 7.0

Copies of the UFAS may be obtained from your State ACTION Office.

Comments:

[FR Doc. 92-8391 Filed 4-9-92; 8:45 am]

BILLING CODE 6050-28-M

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. 92-013]

#### Pseudorabies In Swine; Approved Testing Laboratories

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice

**SUMMARY:** We are updating the list of laboratories approved to perform the HerdChek® Pseudorabies Virus gpl Antibody Test, an approved differential pseudorabies test. In accordance with the regulations governing the interstate movement of swine because of pseudorabies, approved differential pseudorabies tests may be conducted only in laboratories approved by the Administrator. The regulations further state that laboratories approved to conduct these tests will be listed in a notice published in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Dr. William Stewart, Chief Staff Veterinarian, Swine Diseases Staff, VS, APHIS, USDA, room 735, Federal



Building, 6505 Belcrest Road,  
Hyattsville, MD 20782, 301-436-7767.

#### SUPPLEMENTARY INFORMATION:

The regulations governing the interstate movement of swine because of pseudorabies (9 CFR part 85) set forth provisions for using approved differential pseudorabies tests for determining the disease status of herds of swine. The regulations state that approved differential pseudorabies tests may be conducted only in laboratories approved by the Administrator, and that a notice listing laboratories approved to conduct these tests will be published in the *Federal Register*.

This notice lists all laboratories approved, as of January 6, 1992, to conduct the HerdChek® anti-pseudorabies virus glycoprotein I enzyme-linked immunosorbent assay (HerdChek® test). The IDEXX HerdChek® Pseudorabies Virus gpl Antibody Test Kit is approved for use with official gene-altered pseudorabies vaccines manufactured by Syntrovet, Inc. (gpl- and gpX-Deleted PRV-Markergold), Solvay Veterinary, Inc. (gpl), Boehringer-Ingelheim Animal Health, Inc. (gpl), and Norden Laboratories (gpl).

The following is a complete list of laboratories approved to perform the HerdChek® Pseudorabies Virus gpl Antibody Test:

#### Illinois

Illinois Department of Agriculture Animal Disease Laboratory, Galesburg, IL.

#### Indiana

Purdue University Animal Disease Diagnostic Laboratory, West Lafayette, IN.

#### Iowa

Iowa State University Veterinary Diagnostic Laboratory, Ames, IA.

#### Michigan

Michigan Department of Agriculture Laboratory, East Lansing, MI.

#### Minnesota

University of Minnesota Department of Veterinary Diagnostic Investigations, St. Paul, MN.

#### Nebraska

University of Nebraska Veterinary Diagnostic Center, Lincoln, NE.

#### North Carolina

Rollins Animal Disease Diagnostic Laboratory, Raleigh, NC.

#### Ohio

Ohio Department of Agriculture Animal Disease Diagnostic Laboratory, Reynoldsburg, OH.

#### South Dakota

South Dakota State University Animal Disease Research and Diagnostic Laboratory, Brookings, SD.

Authority: 21 U.S.C. 111, 112, 113, 115, 117, 120, 121, 123-126, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

Done in Washington, DC, this 6th day of April 1992.

Robert Melland,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 92-8311 Filed 4-9-92; 8:45 am]

BILLING CODE 3410-34-M

#### Forest Service

##### Restoration Plan for the Exxon Valdez Oil Spill Area, Prince William Sound, Gulf of Alaska, and Alaska Peninsula, Alaska

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement

**SUMMARY:** The Department of Agriculture, Forest Service will be the lead Federal Agency for the Trustee Council in the preparation of a programmatic Environmental Impact Statement (EIS) for the development of a Restoration Plan following the March 24, 1989, Exxon Valdez oil spill. The responsible official for the preparation of the EIS is the Regional Forester, Michael A. Barton. The Restoration Plan will establish management direction and guide all natural resource restoration activities for the next 10 years. Activities will be conducted within the area affected by the Exxon Valdez oil spill.

**DATES:** Initial comments concerning the proposed development of a Restoration Plan should be received by June 4, 1992.

**ADDRESSES:** Send written comments to Dave Gibbons, Acting Administrative Director, Restoration Team, 645 G Street, Anchorage, Alaska, 99501.

**FOR FURTHER INFORMATION CONTACT:** Questions about the proposed action and EIS should be directed to Ken Rice, Deputy Natural Resource Manager, Restoration Team, 645 G Street, Anchorage, Alaska, 99501; phone (907) 278-8012.

#### SUPPLEMENTARY INFORMATION:

##### A. Introduction

On October 8, 1991, a federal court approved settlement between the State and Federal governments and Exxon under which Exxon will pay slightly over \$1 billion in criminal restitution and civil damages to the governments. The State and Federal Trustees will receive \$900 million in civil damages

from Exxon over the next 10 years. The funds are to be used to restore the environment of the areas affected by the Exxon Valdez oil spill to its pre-spill condition. This includes the restoration of any natural resource injured, lost or destroyed and the services provided by that resource or which replaces or substitutes for the injured, lost or destroyed resource and affected services.

All decisions about restoration and uses of restoration funds are determined by six natural resources Trustees, three Federal and three State. The three Federal Trustees are: The Administrator for the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, and the Secretaries of the Department of Agriculture and of the Interior. The three State Trustees are: The Commissioners of Fish and Game and Environmental Conservation, and the Attorney General. A Trustee Council, located in Alaska, which is made up of designees of the Federal Trustees and the three State Trustees, is responsible for all decisions relating to the assessment of injuries, uses of the restoration funds, and all restoration activities including the preparation of a Restoration Plan. The Restoration Plan will provide management direction for restoration by identifying restoration goals, objectives and policy guidelines for conducting restoration activities. The Trustees will prepare a programmatic EIS on the proposed Restoration Plan.

##### B. Possible Restoration Alternatives

Six possible restoration alternatives that may be considered in the proposed Restoration Plan and analyzed in the EIS include:

###### 1. No-Action

This alternative would rely upon the natural recovery process to restore the ecosystem. Monitoring would assess whether natural recovery is proceeding as anticipated.

###### 2. Human Use Management

This alternative uses Federal and State management authorities (statutes and regulations) to modify human uses of resources or habitats. The goal is to reduce mortality or stress on injured resources and to accelerate their recovery.

###### 3. Manipulation of Resources

This approach includes measures taken directly, usually on-site, to rehabilitate or replace an injured species population, restore a damaged



habitat or enhance services provided by a damaged resource.

#### 4. Habitat Protection and Acquisition

This approach includes changes in management practices on public or private lands and creation of "protected" areas on existing public lands in order to prevent further damage to resources injured by the Exxon Valdez oil spill. Going beyond land management practices, there are options that involve the acquisition of damaged habitats or property rights short of title, in order to protect strategic wildlife, fisheries habitat or recreation sites.

#### 5. Acquisition of Equivalent Resources

"Acquisition of equivalent resources means to compensate for an injured, lost, or destroyed resource by substituting another resource that provides the same or substantially similar services as the injured resource" (56 FR 8899 [March 1, 1991]). Restoration approaches, such as the manipulation of resources and habitat protection and acquisition, can be implemented on an equivalent-resource basis.

#### 6. Combination Alternatives

Each of the alternatives above may be considered strictly in its own right or mixed in any number of ways, depending on priorities and methods.

Further information regarding the possible restoration alternatives is included in the Exxon Valdez Oil Spill Restoration, Volume I: Restoration Framework, which will be published in April, 1992.

#### C. Scoping and Issue Development

With publication of this Notice of Intent, the Trustees are continuing a process intended to identify those issues that need to be addressed in preparing the Draft EIS (DEIS) and Draft Restoration Plan. Under the National Environmental Policy Act, this process is called "scoping." The results of the scoping process will guide the preparation of the Draft Restoration Plan and DEIS. During the scoping process the Trustees will seek information, comments, and assistance from Federal, State and local agencies, and other individuals or organizations who may be interested in, or affected by restoration. Public scoping meetings will be held in local communities during April and May 1992. The Exxon Valdez Oil Spill Restoration, Volume I: Restoration Framework, is intended to serve as a scoping document. It provides information about restoration planning to date, a summary of injuries to natural resources, proposed injury criteria and criteria for evaluating restoration

options and alternatives. Public meetings will be held in October 1992 in local communities following publication of the DEIS.

#### D. Expected Time for Completion

A DEIS should be filed with EPA in September 1992 and the final EIS should be filed in February 1993. The Trustees will consider the comments, responses, disclosure of environmental consequences, and applicable laws, regulations and policies in making decisions regarding restoration.

#### E. Comments

The comment period on the DEIS will be 45 days from the date the notice of availability appears in the **Federal Register**. It is very important that those interested in this proposed action participate at that time. To be most helpful, comments on the DEIS statement should be as specific as possible, and may address the adequacy of the statement or the merits of the alternatives discussed. (See the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.03).

In addition, Federal court decisions have established that reviewers of DEIS statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and concerns. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978). Environmental objections that could have been raised at the draft stage may be waived if not raised until after completion of the final EIS. *Wisconsin Heritage, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). The reason for this is to ensure that substantive comments and objectives are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final.

Dated: April 1, 1992.

Michael A. Barton,

Regional Forester.

[FR Doc. 92-8268 Filed 4-9-92; 8:45 am]

BILLING CODE 3410-11-M

#### Exxon Valdez Oil Spill Restoration, Volume I: Restoration Framework, Volume II: 1992 Draft Work Plan

**ACTION:** Availability of the 1992 Draft Work Plan and Restoration Framework Documents for the Exxon Valdez oil spill.

**SUMMARY:** This notice announces that the 1992 Draft Work Plan and Restoration Framework Documents ("1992 Documents") are now available for public review and comment. Responses to the public comments received concerning the 1991 State/Federal Natural Resource Damage Assessment and Restoration Plan for the Exxon Valdez Oil Spill are also available. The Regional Forester for the Alaska Region Michael A. Barton, is acting on behalf of the Trustee Council in releasing this notice.

**DATES:** Comments concerning the 1992 Documents must be received by June 4, 1992.

**ADDRESSES:** Copies of the 1992 Documents may be received by contacting the Trustee Council, 645 G Street, Anchorage, AK, 99501. All comments must be written and submitted to: Trustee Council, 645 G Street, Anchorage, AK, 99501.

**FOR FURTHER INFORMATION CONTACT:** The Oil Spill Public Information Center at the following telephone numbers: (907) 278-8008; In Alaska toll free 1-800-478-7745; Outside Alaska toll free 1-800-283-7745.

**SUPPLEMENTARY INFORMATION:** In October, 1991, the Federal Government and the State of Alaska agreed to a settlement for injuries resulting from the rupture of the T/V Exxon Valdez and the discharge of approximately 11 million gallons of North Slope crude oil into Prince William Sound and the Gulf of Alaska. The natural resources Trustees for the State, the Commissioners of the Departments of Fish and Game and Environmental Conservation and the Alaska Attorney General, and for the Federal Government, the Secretaries of Agriculture and the Interior and the Administrator of the National Oceanic and Atmospheric Administration will receive \$900 million in civil damages over the next ten years to be used to restore the environment of the areas affected by the Exxon Valdez oil spill to its pre-spill condition. A Trustee Council located in Alaska, which is comprised of the Federal Trustees' designees and the State Trustees, are responsible for all decisions relating to the assessment of injuries, uses of the funds received for restoration, and all restoration activities, including the preparation of a Restoration Plan. The Trustee Council is continuing a process intended to identify issues that need to be addressed in preparation of the Restoration Plan. To further this process, the Restoration Framework provides information about restoration planning to date, a summary



of injuries to natural resources, proposed injury criteria, and proposed criteria for evaluating restoration options and alternatives.

This Notice announces the availability of the 1992 Documents and requests comments from the public concerning both the proposed damage assessment and restoration activities to take place in 1992 detailed in the Work Plan, and the proposed process to guide the Trustees and the public to restore the environment injured by the spill discussed in the Framework Document. Those who have not already requested a copy of the 1992 Documents may do so by contracting the Trustee Council indicated in the above address. Written comments concerning the 1992 Documents must be received no later than June 4, 1992.

Dated: April 1, 1992.

Michael A. Barton,  
Regional Forester.

[FR Doc. 92-8267 Filed 4-9-92; 8:45 am]

BILLING CODE 3410-11-M

#### Transfer of Administrative Jurisdiction; Pinon Canyon Maneuver Site, Colorado

AGENCY: Forest Service, USDA.

ACTION: Notice of transfer of land.

**SUMMARY:** On September 10, 1991, the Secretary of the Army signed an order agreeing to the transfer of administrative jurisdiction of approximately 16,354 acres of land at the Pinon Canyon Maneuver Site, Fort Carson, Colorado, consisting of all parcels of land identified by the Secretary of the Army as uneconomic remnant lands, from the Department of the Army to the Department of Agriculture for inclusion in the Comanche National Grassland. The land transferred is known more commonly as the Picket Wire Canyonland.

This transfer was authorized by an Interagency Agreement dated May 29, 1991, which also resolved access and management issues on the land being transferred. The Secretary of Agriculture hereby gives notice of the acceptance of this land. A copy of the order of transfer as signed by the Secretary is set out at the end of this notice.

**DATES:** This transfer was effective December 12, 1991.

**FOR FURTHER INFORMATION CONTACT:** Dave M. Sherman, Lands Staff, 4 South, Forest Service, USDA, P.O. Box 96090, Washington, DC 20090-6090, (202) 205-1362.

Dated: March 19, 1992.

Gordon H. Small,  
Acting Associate Deputy Chief.

#### Department of Agriculture Order of Transfer of Administrative Jurisdiction Over Remnant Lands at the Pinon Canyon Maneuver Site

In compliance with section 2825 of Public Law 101-510, notice is hereby given that those lands heretofore under the administrative jurisdiction of the Department of the Army at the Pinon Canyon Maneuver Site in Las Animas and Otero Counties, Colorado, consisting of approximately 16,354 acres of uneconomic remnant land as generally depicted on a map entitled "Land Transfer-Pinon Canyon Maneuver Site" dated February 12, 1991, are hereby transferred to the administrative jurisdiction of the Department of Agriculture for inclusion in the Comanche National Grassland.

The legal description and map of the property transferred by this Order are on file and available for public inspection in the Office of the Chief of the Forest Service, Department of Agriculture, Washington, DC.

Dated: December 12, 1991.

Edward R. Madigan,  
Secretary of Agriculture.

[FR Doc. 92-8302 Filed 4-9-92; 8:45 am]

BILLING CODE 3410-11-M

#### DEPARTMENT OF COMMERCE

##### Agency Form Under Review by the Office of Management and Budget

DOC has submitted to Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Bureau of the Census.

Title: 1992 Census of Governments - Survey of Government Employment.

Form Number(s): E-1 through E-9.

Agency Approval Number: None.

Type of Request: New collection.

Burden: 78,763 hours.

Number of Respondents: 71,040.

Avg Hours Per Response: 1 hour and 6 minutes.

**Needs and Uses:** This is a request for approval of nine data collection forms for use in the employment phase of the 1992 Census of Governments. The survey of government employment is conducted every five years as part of the census of governments. Data are collected on state and local government employment and pay, costs for employee benefits, social security coverage of employees, and labor-management relations policies and activities. Each form is tailored to the particular size and type of government to be surveyed. The Bureau of Economic Analysis uses this data to develop the

public sector components of the gross national product and national income accounts, and to develop personal income statistics. The Department of Housing and Urban Development determines the allocation of operating subsidies to local housing authorities based on this survey. The Bureau of Labor Statistics uses data from this survey to assist in the benchmarking of state and local government components of its monthly employment and earnings statistics. The Social Security Administration and Department of Health and Human Services track the extent of social security coverage for state and local government employees using the data collected in the survey. In addition, state and local government officials, public interest groups, and professional organizations use the data for analysis and study.

**Affected Public:** State or local governments.

**Frequency:** Every five years.

**Respondent's Obligation:** Voluntary.

**OMB Desk Officer:** Maria Gonzalez, (202) 395-7313.

Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 377-3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Maria Gonzalez, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Dated: April 6, 1992.

Edward Michals,

Departmental Forms Clearance Officer,  
Office of Management and Organization.

[FR Doc. 92-8299 Filed 4-9-92; 8:45 am]

BILLING CODE 3510-07-F

#### International Trade Administration

[C-535-001]

##### Cotton Shop Towels From Pakistan; Final Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Final Results of Countervailing Duty Administrative Review.

**SUMMARY:** On January 22, 1992, the Department of Commerce published the preliminary results of its administrative review of the countervailing duty order



on cotton shop towels from Pakistan for the period January 1, 1990 through December 31, 1990. We have now completed that review and determine the total bounty or grant to be 6.28 percent *ad valorem*.

**EFFECTIVE DATE:** April 10, 1992.

**FOR FURTHER INFORMATION CONTACT:** Christopher Beach or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC, 20230; telephone: (202) 377-2786.

**SUPPLEMENTARY INFORMATION:**

**Background**

On January 22, 1992, the Department of Commerce (the Department) published in the *Federal Register* (57 FR 2516) the preliminary results of this administrative review of the countervailing duty order on cotton shop towels from Pakistan (49 FR 8974; March 9, 1984). The Department has now completed this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

**Scope of Review**

Imports covered by this review are shipments of Pakistani cotton shop towels. During the review period, such merchandise was classifiable under item number 6307.10.20 of the Harmonized Tariff Schedule (HTS). The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period January 1, 1990 through December 31, 1990, sixteen companies, and five programs: (1) Export Financing Scheme; (2) Excise Tax, Sales Tax and Customs Duty Rebate programs; (3) Income Tax Reductions for Exports; (4) Import Duty Rebates; and (5) Export Credit Insurance.

**Analysis of Comments Received**

We gave interested parties an opportunity to comment on the preliminary results. We received comments from the respondents, the Export Promotion Bureau of Pakistan and the exporters of cotton shop towels from Pakistan.

*Comment 1:* Respondents object to the Department's rejection of their supplemental response as untimely. The supplemental response was filed on January 3, 1992, prior to publication of the preliminary results notice but after the expiration of the deadline set by the Department. The return of this submission, respondents contend, had extremely adverse consequences for two companies who received a company-specific rate based on the best

information available ("BIA"). Respondents claim that in this administrative review the Department failed to follow its own rules by accepting the petitioner's request for an administrative review which was completed after the regulatory deadline. Equity therefore dictates that the Department accept the respondents' January 3, 1992, submission. Respondents, therefore, ask that the Department specifically request that this information be submitted under § 355.31(b)(1) of the Department's regulations, prior to rendering a final determination.

*Department's Position:* Contrary to respondents' belief, the Department provided respondents every opportunity to submit the necessary information during the course of this proceeding. The Department issued a supplemental questionnaire to cure significant omissions found in the response to the original questionnaire. Respondents' omissions appeared in the response, despite the fact that respondents were granted three subsequent extensions to the deadline originally set by the Department for submission of the original questionnaire response. Considering the fact that we had already granted these three extensions for responding to the original questionnaire, in order to meet the statutory deadlines set for the completion of this administrative review, no further extension was given to the deadline for the supplemental questionnaire response. The supplemental response of January 3, 1992, was submitted two weeks after the deadline set by the Department. Under these circumstances, it is clear that the Department has provided respondent more than a fair and reasonable opportunity to submit for the record the necessary information.

*Comment 2:* Respondents contend that, in calculating the benefit for United Towel Exporters (United) from the Income Tax Reduction for Exports program, the Department failed to recognize that the amount of tax reduction listed in the questionnaire response was calculated based on total exports of subject and non-subject merchandise and not on exports of the subject merchandise to the United States. According to respondents, the Department should calculate the ratio of U.S. exports of subject merchandise to total exports and include in the benefit calculations only the corresponding share of the amount of income tax reduction received.

*Department's Position:* We reexamined the information provided. We note that United, as well as all other

companies that responded to the questionnaire, provided information showing that the benefit under this program was calculated based on total exports of subject and non-subject merchandise. Consequently, to calculate the benefit from this program we have used as our denominator the company's total exports rather than their exports to the United States. On this basis, we determine the benefit from this program to be 0.18 percent *ad valorem* during the review period.

*Comment 3:* Respondents allege that certain companies that used the Export Finance Scheme reported all export financing that was outstanding during the review period rather than financing solely on exports to the United States. As a result, the amount of each company's total financing attributed by the Department to exports of cotton shop towels to the United States, greatly exceeded the value of those exports. This is unlikely in light of this program's operation as described in the Department's preliminary notice, whereby financing exceeding export performance would incur a stiff penalty. Therefore, respondents contend that the Department should use each company's total exports in the calculation of the benefit from this program.

*Department's Position:* We addressed this issue in the last administrative review (see, Cotton Shop Towels from Pakistan; Final Results of Countervailing Duty Administrative Review (56 FR 28740; June 24, 1991)). In this review, we examined the information provided in the questionnaire response and determined that certain companies again reported loan amounts that exceeded the value of their exports of cotton shop towels to the United States. However, respondents did not demonstrate which of these loans were attributable to non-U.S. exports, despite the fact that the Department's questionnaire specifically asked for this information. In the absence of information tying these loans to non-U.S. exports, as best information available, for each company we divided the total benefit attributable to each company's loans by the value of the company's U.S. exports. However, it is unlikely that the program provides preferential financing at an amount greater than 100 percent of the value of those exports. Therefore, as in the previous review, we calculated the benefit to these companies based on an amount of financing equal to the value of each company's exports of cotton shop towels to the United States. On this basis, we determine the benefit



from this program to be 1.82 percent *ad valorem* during the review period.

**Comment 4:** Respondents claim that with respect to the Income Tax Reduction for Exports Program, the benefit for Fine Fabric was incorrectly entered in the summary calculation sheet and should be corrected. In addition, with respect to the Export Financing Program, respondents claim that the benefit from a loan reported by Sultex Industries was counted twice and should be corrected.

**Department's Position:** We agree, and have adjusted our calculations accordingly. On this basis, we determine the benefit from the Income Tax Reduction for Exports program to be 0.18 percent *ad valorem* (see, Comment 2), and the benefit from the Export Finance Scheme (See Comment 3) to be 1.82 percent *ad valorem*.

#### Calculation Methodology for Assessment and Cash Deposit Purposes

In our preliminary results Eastern Textiles Ltd., Hilal Corporation Ltd., and Mohsin Brothers received aggregate benefits which were five percentage points greater than the weighted-average country-wide rate (significantly different within the meaning of 19 CFR 355.22(d)(3)(i)) and consequently received separate rates for assessment and cash deposit purposes. As a result of the adjustments made in our final calculations, the rates for these three companies are no longer significantly different from the weighted-average country-wide rate. Therefore, these three companies now receive the country-wide rate for the review period.

#### Final Results of Review

As a result of our review, we determine the total bounty or grant to be 6.28 percent *ad valorem* during the period January 1, 1990 through December 31, 1990.

Therefore, the Department will instruct the Customs Service to assess countervailing duties of 6.28 percent of the f.o.b. invoice price on shipments of this merchandise exported on or after January 1, 1990 and on or before December 31, 1990.

Further, the Department will instruct the Customs Service to collect cash deposits of estimated countervailing duties of 6.28 percent of the f.o.b. invoice price on all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit requirement shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: April 1, 1992.

Marjorie A. Chorlins,  
Acting Assistant Secretary for Import  
Administration.

[FR Doc. 92-8341 Filed 4-1-92; 8:45 am]

BILLING CODE 3510-DS-M

#### National Oceanic and Atmospheric Administration

##### South Atlantic Fishery Management Council; Public Meetings/Public Hearing

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

The South Atlantic Fishery Management Council (Council) and its Committees will hold public meetings on April 27—May 1, 1992, at the Town and County Inn, 2008 Savannah Highway, Charleston, SC, telephone: (803) 571-1000.

#### Council

The public is invited and encouraged to attend a scoping meeting on April 27 from 7 p.m. until 8:30 p.m., to comment on the use of marine fishery reserves as an option for managing snapper and grouper. The Council will hold a closed (not open to the public) session of the Advisory Panel Selection Committee on April 28 from 8:30 a.m. until 10 a.m.

The Council will also continue work during its meeting on an amendment to change the requirement for fishermen applying for spiny lobster permits so that at least 10 percent of their earned income must come from commercial fishing during one of the three years preceding the application. (Currently, the income requirement must be met during the year preceding the application.) A Federal spiny lobster commercial vessel permit is required for fishing vessels engaged in harvesting lobsters for sale or for the harvest or possession of more than six lobsters per persons per day in Federal waters. The Council will eliminate the requirement for spiny lobster permit in Federal waters off Florida for those using traps upon approval of Florida's proposed trap-reduction program.

The Council will also: (1) Evaluate the expanding recreational fishery in North Carolina, South Carolina and Georgia; (2) consider modifying the recreational season and bag limits for states north of Florida; (3) evaluate requiring use of escape panels; and (4) discuss prohibiting the use of "shorts" as attractants. The South Carolina Wildlife

and Marine Resources Department is requesting that the Council establish special management zones (SMZs) around eight artificial reefs in Federal waters off the South Carolina coast and that fishing methods utilized within these zones be restricted to hand-held hook-and-line fishing and spearfishing. Hand-held hook-and-line gear includes manual, electric or hydraulic rod-and-reel gear. Spearfishing excludes powerheads. The eight areas under consideration are: Little River Offshore, BP-25, Vermilion, Cape Romain, Y-73, Eagles Nest, Bill Perry Jr. and Comarche. The Council will hold a public hearing at 1:30 p.m., April 28, on designating these areas as SMZs.

#### Committees

The Spiny Lobster Committee will review Florida's proposed spiny lobster trap reduction program. The program, which is scheduled to become effective in July 1992, would establish a transferable trap certificate program (for Florida's waters as well as Federal waters off Florida) that will gradually reduce the number of working traps while allowing fishermen who want to stay in the fishery to do so. All spiny lobster fishermen will be required to obtain trap certificates this year; however, actual trap reduction will begin in 1993.

The program will proceed if it meets the objectives of the Council's spiny lobster plan, national standards of the Magnuson Fishery Conservation and Management Act and other applicable law, and if the Council does not object based on the above requirements. For information on the program, please contact the Florida Marine Fisheries Commission (Commission) (phone: 904-487-0554). The Commission is requesting that the Council adopt the following regulations in Federal waters: (1) Require the measurement of lobsters in the water by divers; (2) establish uniform sizes of buoy identification numbers; (3) prohibit harvesting in excess of the bag limit during the night diving; (4) define allowable gear as specified by the Commission; (5) allow no more than 50 undersize lobsters as attractants per vessel or one per trap. The Commission also is requesting that all traps fished off Florida have a tag from the Florida Department of Natural Resources to ensure that Federal waters are included in the trap reduction program.

The Snapper-Grouper Committee will discuss the black sea bass trap fishery, focusing on the impacts of multi-gear trips and limitations on species that can



be retained legally while traps are on board.

The Shrimp Committee will discuss the status of the draft shrimp fishery management plan that was not approved at the last Council meeting because of a requirement by the National Marine Fisheries Service for the Council to incorporate a biological assessment into the plan.

The Mackerel Committee will review the annual stock assessment and bag limit analysis for king and Spanish mackerel. The Committee will make recommendations to the Council on quotas and bag limits for the 1992-93 king and Spanish mackerel season, after reviewing recommendations from the Scientific and Statistical Committee and Mackerel Advisory panel.

The Habitat and Limited Access Committees also are scheduled to meet.

A detailed agenda with specific meeting times will be made available to the public on or about April 9. For more information contact Carrie Knight, Public Information Officer: South Atlantic Fishery Management Council; One Southpark Circle, suite 306; Charleston, SC 29407-4699; telephone: (803) 571-4366.

Dated: April 6, 1992.

David S. Crestin,

Deputy Director, Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 92-8272 Filed 4-9-92; 8:45 am]

BILLING CODE 3510-22-M

## Marine Mammals

**AGENCY:** National Marine Fisheries Service, NOAA.

**ACTION:** Application for Scientific Research Permit (P135C).

**SUMMARY:** Notice is hereby given that Mr. James H.W. Hain, Associated Scientists at Woods Hole, Inc., Box 721, Woods Hole, MA 02543 (508/564-4449), has applied for a Scientific Research Permit to take annually up to 25 right whales (*Eubalaena glacialis*), 45 humpback whales (*Megaptera novaeangliae*), 550 Atlantic bottlenose dolphins (*Tursiops truncatus*), 20 sperm whales (*Physeter macrocephalus*), 500 (*Stenella* spp.), 300 pilot whales (*Globicephala* spp.), 5 Cuvier's beaked whales (*Ziphius cavirostris*), 50 fin whales (*Balaenoptera physalus*), 40 minke whales (*B. acutorostrata*), 200 Atlantic white-sided dolphins (*Lagenorhynchus acutus*), 175 loggerhead turtles (*Caretta caretta*), 25 Kemp's Ridley turtles (*Lepidochelys kempi*) and 45 leatherback turtles (*Dermochelys coriacea*). The animals

would be taken by inadvertent harassment, primarily during surveys from an airship, including experiments with low-level flight and close approaches. Takes by inadvertent harassment may also occur during research involving fixed-wing aircraft, surface vessels, and underwater acoustic surveys. Activities will occur in the continental shelf waters off the east coast of the United States out to a distance of 100 nautical miles from the shoreline. The principal research areas will be coastal waters off Florida, Georgia, North Carolina and Massachusetts.

The purposes of the study are to: (1) Assess the utility of the airship as a platform for marine mammal research, including the effects of overflights at close approach altitudes; and (2) obtain information on the biology and behavior of cetaceans and marine turtles (i.e., feeding behaviors/ strategies, distribution and abundance of cetaceans; distribution and abundance of cetaceans and marine turtles in relation to habitat and environmental parameters; and surface/dive time relationship and other behaviors).

Concurrent with the publication of this notice in the *Federal Register*, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors. Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S. Department of Commerce, 1335 East-West Highway, SSMC#1, room 7324, Silver Spring, MD 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of those of the applicant and do not necessarily reflect the views of the National Marine Fisheries Service.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

*By appointment:* Office of Protected Resources, National Marine Fisheries Service, NOAA, 1335 East-West Highway, room 7324, Silver Spring, MD 20910 (301/713-2289);

Director, Northeast Region, National Marine Fisheries Service, NOAA, One Blackburn Drive, Gloucester,

Massachusetts 01930 (508/281-9200); and

Director, Southeast Region, National Marine Fisheries Service, NOAA, 9450 Koger Blvd., St. Petersburg, Florida 33702 (813/893-3141).

Dated: April 3, 1992.

Nancy Foster,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 92-8287 Filed 4-9-92; 8:45 am]

BILLING CODE 3510-22-M

## COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

**Amendment of Export Licensing Requirements for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in the People's Republic of China**

April 6, 1992.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs amending export licensing requirements to require manufacturer's identification.

**EFFECTIVE DATE:** May 1, 1992.

**FOR FURTHER INFORMATION CONTACT:** Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11851 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The existing export licensing system between the Governments of the United States and the People's Republic of China is being amended, for goods produced or manufactured in the People's Republic of China and exported from the People's Republic of China on and after May 1, 1992, to require that the complete name and address of a company actually involved in the manufacturing process of the textile product covered by the visa be provided on the textile export license/commercial invoice.



See 49 FR 7269, published on February 28, 1987; and 52 FR 28741, published on August 3, 1987.

**Auggie D. Tantillo,**

*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

April 6, 1992.

Commissioner of Customs,

*Department of the Treasury, Washington, DC 20229.*

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on February 23, 1984, as amended, by the Chairman, Committee for the Implementation of Textile Agreements. That directive directs you to prohibit entry of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in China which were not properly visaed by the Government of the People's Republic of China.

Effective on May 1, 1992, for goods produced or manufactured in the People's Republic of China and exported from the People's Republic of China on and after May 1, 1992, you are directed to require that the complete name and address of a company actually involved in the manufacturing process of the textile product covered by the visa be provided on the textile export license/commercial invoice.

Shipments entered or withdrawn from warehouse according to this directive which are not accompanied by an appropriate export visa which includes the identification of the manufacturer on the export licensing/commercial invoice shall be denied entry and a new visa with the manufacturer's identification on the export license/commercial invoice must be obtained.

The Committee for the Implementation of Textile Agreements has determined that this action falls within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

**Auggie D. Tantillo,**

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 92-8295 Filed 4-9-92; 8:45 am]

BILLING CODE 3510-DR-F

**Cancellation of a Previous Document Concerning Denial of Participation in the Special Access and Special Regime Programs**

April 6, 1992.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**FOR FURTHER INFORMATION CONTACT:** Lori E. Goldberg, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-3400.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The purpose of this notice is to cancel the notice and letter to the Commissioner of Customs published in the **Federal Register** on December 26, 1991 which announced that Macclenny Products, Inc., would be denied the right to participate in the Special Access and Special Regime Programs for the period April 1, 1992 through March 31, 1993.

This document was superseded by the document published in the **Federal Register** on March 12, 1992 (57 FR 9417) which states that Macclenny Products, Inc., would be denied the right to participate in the Programs for the two-month period beginning on June 1, 1992 and extending through July 31, 1992.

**Auggie D. Tantillo,**

*Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 92-8296 Filed 4-9-92; 8:45 am]

BILLING CODE 3510-DR-F

**COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED**

**Procurement List; Additions**

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.

**ACTION:** Additions to Procurement List.

**SUMMARY:** This action adds to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

**EFFECTIVE DATE:** May 11, 1992.

**ADDRESSES:** Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** On October 11, December 6, 13, 1991, January 10, February 14 and 28, 1992 the Committee for purchase from the Blind and Other Severely Handicapped published notices (56 FR 51376, 63937, 65047, 57 FR 1147, 5420 and 6814/5) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to produce the commodities and provide the services at a fair market price and impact of the addition on the current or most recent contractors, the Committee

has determined that the commodities and services listed below are suitable for procurement by the Federal Government Under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities or services to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities or services.

3. The action will result in authorizing small entities to furnish the commodities or services to the Government.

4. There are no known regulatory alternatives which would accomplish the objective of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities or services proposed for addition to the Procurement List.

Accordingly, the following commodities and services are hereby added to the Procurement List:

*Commodities*

Tool Box, Portable  
5140-00-226-9019  
Harness, Night Vision  
5855-01-334-6594  
Diskette, Flexible  
7045-01-209-2193  
Compound, Corrosion Preventive  
8030-01-041-1596  
8030-01-066-3971

*Services*

Commissary Shelf Stocking and Custodial,  
Brooks Air Force Base, Texas.  
Janitorial/Custodial, Federal Building, St.  
George, Utah.  
Mailroom Service, General Services  
Administration Regional Office, 1500 E.  
Bannister Road, Kansas City, Missouri.

This action does not affect contracts awarded prior to the effective date of this addition or options exercised under those contracts.

**Beverly L. Milkman,**

*Executive Director.*

[FR Doc. 92-8355 Filed 4-9-92; 8:45 am]

BILLING CODE 6820-33-M

**Procurement List; Proposed Additions**

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.



**ACTION:** Proposed additions to Procurement List.

**SUMMARY:** The Committee has received proposals to add to the Procurement List services to be furnished by nonprofit agencies employing persons with severe disabilities.

**DATES:** Comments must be received on or before May 11, 1992.

**ADDRESSES:** Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed action.

If the Committee approves the proposed addition, all entities of the Federal Government (except as otherwise indicated) will be required to procure the services listed below from the designated nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.
2. The action will result in authorizing small entities to furnish the services to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

It is proposed to add the following services to the Procurement List for provision by the designated nonprofit agency:

Janitorial/Custodial, for the following locations in Connecticut:  
East Windsor USARC  
West Hartford USARC  
Windsor Locks USARC  
Nonprofit Agency: Greater Enfield ARC, Inc., Enfield, Connecticut.

Janitorial/Custodial, U.S. Nuclear Regulatory Commission Warehouse, 5000-5010 Bolling Brook Parkway, Rockville, Maryland.

Nonprofit Agency: Davis Memorial Goodwill Industries, Washington, DC.

Janitorial/Custodial, U.S. Army Reserve Center, 200 Baker Road, Pittsfield, Massachusetts.

Nonprofit Agency: Berkshire County Association for Retarded Citizens, Inc., Pittsfield, Massachusetts.

Beverly L. Milkman,  
Executive Director.

[FR Doc. 92-8356 Filed 4-9-92; 8:45 am]

BILLING CODE 6820-33-M

#### Procurement List; Additions

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.

**ACTION:** Additions to Procurement List.

**SUMMARY:** This action adds to the Procurement List protective life preserver covers to be furnished by a nonprofit agency employing persons who are blind.

**EFFECTIVE DATE:** May 11, 1992.

**ADDRESSES:** Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** On January 24, 1992, the Committee for Purchase from the Blind and Other Severely Handicapped published a notice (57 FR 2895) of the proposed addition of these life preserver covers to the Procurement List.

Comments were received from the three current contractors for the life vest covers and from another business. These comments addressed the impact on the contractor and others of the proposed addition to the Procurement List, the capability of nonprofit agencies employing blind workers to make the items, and current contractor employment of persons with disabilities.

Comments concerning impact included assertions that contractor employees would lose jobs as a result of the proposed addition, and that expenditures had been made on equipment and training which could not be recovered or transferred to other products. One contractor noted that it had been a longtime Government supplier of these items. Three commenters claimed that the impact of the proposed addition would be magnified by the shrinking of Department of Defense (DoD) purchases

in this product area, and one claimed that as a result of increased efforts by Federal Prison Industries (FPI) to add textile products to its mandatory source program, the Defense industrial base for these products was being reduced to FPI, the Committee's program, and the Small Business Administration 8(a) program.

The Committee considers that the possible loss of jobs by persons without disabilities is outweighed by the creation of jobs for persons with severe disabilities who traditionally have very high unemployment rates. Because the competitive bidding system does not guarantee any contractor a contract on a continuing basis, the Committee does not consider the loss of opportunity to recover investments in training and equipment by itself to be severe adverse impact. The Committee has taken into account the impact of previous additions to the Procurement List on current contractors for these items in reaching its conclusion that the current addition does not constitute severe adverse impact on these contractors. While the Committee is aware that the DoD downsizing may affect future purchases of many items, the commenters have not provided any details to support their contentions that the impact of the proposed addition to the Procurement List will be magnified by DoD actions, or that the Defense industrial base is being reduced to the sources cited. Consequently, the Committee is unable to assess the additional impact that these actions may have on the proposed addition to the Procurement List.

One commenter stated that it would be difficult for nonprofit agencies employing people with severe disabilities to follow Government specifications and make these items correctly. Another commenter noted that these items are critical safety items which require a high level of quality.

Nonprofit agencies participating in the Committee's program are required to produce to the same specifications and the same level of quality as other Government contractors. Both the central nonprofit agency representing the nonprofit agency which will produce these life vest covers and the Government agency which purchases them have inspected the nonprofit agency and have informed the Committee that they consider the nonprofit agency to be capable of producing the covers.

One contractor said that it employs two deaf people and one with mental retardation. It also noted that it subcontracts work to a local nonprofit agency employing people with severe



disabilities. The contractor did not indicate that these people of the nonprofit agency would be displaced if the items are added to the Procurement List.

The Committee appreciates the contractor's efforts to employ people with disabilities and to subcontract work to nonprofit agencies employing them. However, because the Committee's program requires employment of a high percentage of persons with severe disabilities in the direct labor force of participating nonprofit agencies, it feels that the creation of these jobs outweighs the unlikely possibility that the contractor, which is free to discharge its employees with disabilities for any reason, or to subcontract with other businesses than the nonprofit agency it mentioned, may terminate this employment or subcontracting because of the addition of these items to the Procurement List. After consideration of the material presented to it concerning capability of qualified nonprofit agencies to produce the commodities at a fair market price and impact of the addition on the current or most recent contractors, the Committee has determined that the commodities listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities.

3. The action will result in authorizing small entities to furnish the commodities to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c) in connection with the commodities proposed for addition to the Procurement List.

Accordingly, the following commodities are hereby added to the Procurement List:

Cover, Protective, Life Preserver

4220-00-926-9459

4220-00-926-9460

4220-00-926-9461

4220-00-926-9462

4220-00-926-9464

4220-00-926-9465

4220-00-926-9466

4220-00-926-9467

4220-00-926-9468

4220-00-926-9469

4220-00-926-9471

4220-00-926-9472

4220-00-926-9473

4220-00-926-9474

4220-00-926-9475

4220-00-926-9476

4220-00-926-9478

4220-00-926-9479

This action does not affect contracts awarded prior to the effective date of this addition or options exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 92-8357 Filed 4-9-92; 8:45 am]

BILLING CODE 6820-33-M

## CONSUMER PRODUCT SAFETY COMMISSION

### Request for Approval of Collection of Information, Compliance Survey of the Adult Sleepwear Industry

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

**SUMMARY:** In accordance with provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Consumer Product Safety Commission has submitted to the Office of Management and Budget a request for approval through December 31, 1992, of a collection of information in the form of a survey of firms which manufacture or import adult sleepwear. The purpose of this survey is to assess the over-all level of compliance of the adult sleepwear industry with the Standard for the Flammability of Clothing Textiles (16 CFR 1610). This standard was mandated by the Flammable Fabrics Act of 1953 (Pub. L. 83-88; 67 Stat 111) to prohibit the manufacture, importation, or sale of articles of wearing apparel which are so highly flammable as to be dangerous when worn by individuals. The standard prescribes a test to determine if articles of wearing apparel are dangerously flammable because of rapid and intense burning. The survey of the adult sleepwear industry is part of a comprehensive plan to assess compliance by regulated industries with 70 rules enforced by the Commission.

The Commission will use the information obtained from the survey of the adult sleepwear industry to establish priorities for enforcement of mandatory standards and regulations which the Commission administers. Information obtained from this survey will also be used to support appropriate legal action

against any firm which has manufactured or imported sleepwear in adult sizes which fails to comply with the requirements of the clothing textiles flammability standard.

### Additional Details About the Request for Approval of a Collection of Information

Agency address: Consumer Product Safety Commission, Washington, DC 20207.

Title of information collection: Adult Sleepwear Compliance Survey.

Type of request: New request.

Frequency of collection: One time.

General description of respondents: Manufacturers and importers of sleepwear in adult sizes.

Estimated number of respondents: 50.

Estimated average number of hours per respondent: 6.

Estimated number of hours for all respondents: 300.

Comments: Comments on this request for extension of approval of information collection requirements should be addressed to Elizabeth Harker, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; telephone (202) 395-7340.

Copies of the request for extension of information collection requirements are available from Francine Shacter, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504-0416.

This is not a proposal to which 44 U.S.C. 3504(h) is applicable.

Dated: April 6, 1992.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 92-8282 Filed 4-9-92; 8:45 am]

BILLING CODE 6355-01-M

## DEPARTMENT OF ENERGY

### Morgantown Energy Technology Center Grant; Financial Assistance Award to Lehigh University

AGENCY: Morgantown Energy Technology Center, Department of Energy (DOE).

ACTION: Notice of acceptance of an unsolicited financial assistance application for Grant award.

**SUMMARY:** Based upon a determination made pursuant to 10 CFR 600.7(B)(2)(i)(A) the DOE, Morgantown Energy Technology Center gives notice of its plans to award a 42 month Grant



to the Lehigh University with an associated budget of approximately \$516,627 of which the participant will cost share approximately 20 percent.

**FOR FURTHER INFORMATION CONTACT:** Laura E. Brandt, I-07, U.S. Department of Energy, Morgantown Energy Technology Center, P.O. Box 880, Morgantown, West Virginia 26507-0880, Telephone: (304) 291-4079, Procurement Request No. 21-92MC29228.000.

**SUPPLEMENTARY INFORMATION:** The pending award is based on an application for the project entitled "Selective Methane Oxidation Over Promoted Oxide Catalysts." The objective of the project is to expand the knowledge base of conversion chemistry and potential processes and to provide technical and economic advances for the conversion of natural gas to high value hydrocarbons (such as gasoline, distillates, or other liquid fuels or fuel additives) to the acceptable point for commercialization in the private sector. This bench-scale research is focused on the development of an economical process to convert the natural gas to liquid fuels utilizing catalytic technologies. The conversion of natural gas to liquid fuels would provide new market areas for natural gas and would provide the means for transporting costly natural gas from remote areas and offshore reservoirs to market at acceptable costs. Development of this technology would reduce the dependence on foreign supplies and stimulate the use of abundant U.S. domestic natural gas. Successful use of natural gas would play a major role in the future implementation of environmentally benign energy technologies for commercial, industrial, and electric utility applications. A noncompetitive assistance award to Lehigh University is necessary because the project is a continuation of a research activity funded by DOE. Competition for support would have a significant adverse effect on the continuity or completion of the activity.

Issued: April 1, 1992.

Louie L. Calaway,

*Director, Acquisition and Assistance Divisions, Morgantown Energy Technology Center.*

[FR Doc. 92-8330 Filed 4-9-92; 8:45 am]

BILLING CODE 6450-01-M

# **Privacy Act of 1974; Adoption of Amendment to an Existing System of Records**

**AGENCY:** Department of Energy.

**ACTION:** Final notice of adoption of amendment to an existing system of records.

**SUMMARY:** The Department of Energy is amending "DOE-54 Investigative Files of Inspector General" and establishing a revised system of records. The revised system is entitled "Investigative Files of the Office of Inspector General" and maintains investigative data on magnetic media as well as on paper records. In the revised system, the description of individuals covered by the system is more specific, but the number of categories of individuals covered is not increased. Additional exemptions pursuant to section (j)(2), (k)(1), (k)(2), and (k)(5) of the Privacy Act of 1974, 5 U.S.C. 552a, are applied to the system, and the new authority for DOE's Office of Inspector General (IG) is cited. Additional routine uses have been established to more accurately reflect standard IG investigative procedures.

**EFFECTIVE DATE:** April 10, 1992.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marian C. Bennett, Office of Inspector General, U.S. Department of Energy, IG-1 FORRESTAL, 1000 Independence Avenue, SW., Washington, DC 20585 (202) 586-4393.

Mr. John H. Carter, Director, Reference and Information Management, U.S. Department of Energy, AD-62 FORRESTAL, 1000 Independence Avenue, SW., Washington, DC 20585 (202) 586-5955.

Mr. Abel Lopez, Office of General Counsel, U.S. Department of Energy, GC-43 FORRESTAL, 1000 Independence Avenue, SW., Washington, DC 20585 (202) 586-8618.

**SUPPLEMENTARY INFORMATION:** On September 18, 1991, DOE issued a proposed amendment to an existing system of records, "DOE-54 Investigative Files of Inspector General." See 56 FR 47945, September 23, 1991. Comments on the proposed amendment were requested by November 22, 1991. One comment was received. An analysis and response to that comment follow:

## **A. General**

1. *Comment:* The one commenter objected in general to the application of the (j)(2) exemption to Offices of Inspector General. It was the commenter's position that the (j)(2) exemption was not applicable as a matter of law to Offices of Inspector General. The commenter wrote that the (j)(2) exemption could only be applied to a system of records maintained by an agency or component which performs as

its principal function criminal law enforcement. In the view of the commenter, criminal law enforcement was not the principal function of an Inspector General. The commenter suggested that the (k)(1), (k)(2), and (k)(5) exemptions could be used for this system of records.

*Response:* The Department agrees with the commenter that the (j)(2) exemption only applies to agencies or distinct subunits that have as a principal function criminal law enforcement. The revised DOE-15 applies only to IG criminal files and records that are maintained by the IG's Office of Investigations. The principal function of the Office is criminal law enforcement. DOE-54 does not apply to any other IG files.

The Department of Energy has consulted with the Office of Management and Budget (OMB), the agency charged with enforcing the Privacy Act. OMB states that its position has been that an Office of Inspector General component that has criminal law enforcement responsibility can properly invoke the (j)(2) exemption. According to OMB, the exemption can be applied to records that are compiled for criminal law enforcement purposes. The Department of Energy's application of the (j)(2) exemption for the Office of Inspector General is consistent with the guidance from the Office of Management and Budget.

Issued in Washington, DC, this 7th day of April, 1992.

Edwin F. Inge,

*Principal Deputy Director of Administration and Human Resource Management.*

## **DOE-54**

### **SYSTEM NAME:**

Investigation Files of the Office of Inspector General.

### **SYSTEM CLASSIFICATION:**

Generally unclassified. Classified material is sometimes maintained.

### **SYSTEM LOCATION:**

Official case files and working files are located at:

U.S. Department of Energy, Office of Inspector General, Headquarters, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585  
U.S. Department of Energy, Office of Inspector General, PO Box 54000, Albuquerque, New Mexico 87115  
U.S. Department of Energy, Office of Inspector General, PO Box 1328, Oak Ridge, Tennessee 37831-1328



U.S. Department of Energy, Office of  
Inspector General, PO Box 754,  
Richland, Washington, 99352

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Subjects of an investigation, witnesses in an investigation, sources of investigative information, investigative personnel, and other individuals involved in an Office of Inspector General investigation.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Criminal, civil, and administrative investigative records and files.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Inspector General Act of 1978, as amended, 5 U.S.C. App. 3.

**PURPOSE(S):**

Pursuant to the Inspector General Act of 1978, 5 U.S.C. App. 3, the records in this system are used by the IG in furtherance of the responsibilities of the Inspector General. These responsibilities include conducting and supervising investigations relating to Departmental programs and operations; promoting economy, efficiency, and effectiveness in the administration of such programs and operations, and preventing and detecting fraud and abuse in such programs and operations.

The records are used in investigations of individuals and entities suspected of having committed illegal or unethical acts and in any resulting criminal prosecutions, civil proceedings, or administrative actions.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OR USERS AND PURPOSES OF SUCH USES:**

Pursuant to the Inspector General Act of 1978, as amended, 5 U.S.C. App. 3, the information contained in the investigative files is collected and maintained in carrying out the duties and responsibilities of the Inspector General to investigate, prevent and detect fraud and abuse in departmental programs and operations. Material gathered is used for prosecutive, civil or administrative actions.

If information contained in an investigative file indicates a violation or a potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program pursuant thereto, all information in the investigative file may be referred as a routine use to the appropriate agency, whether Federal, State, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the

statute, or rule, regulation or order issued pursuant thereto. Records also may be disclosed in accordance with the routine uses 2 through 10 as listed in appendix B of 47 FR 14333, April 2, 1982.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper, micrographic and/or magnetic medium.

**RETRIEVABILITY:**

By name, case number, and title of investigative report.

**SAFEGUARDS:**

Files are maintained within a cipher and key-locked storage room. Classified information is maintained in locked General Services Administration approved class 6 security containers. Data maintained on personal computers can be accessed only by authorized staff using established procedures.

**RETENTION AND DISPOSAL:**

Records retention and disposal authorities are contained in DOE Order 1324.2, RECORDS DISPOSITION. Records within the DOE are destroyed by shredding, burning, or burial in a sanitary landfill, as appropriate. Automated files are erased through approved security processes.

**SYSTEM MANAGER(S) AND ADDRESS:**

Assistant Inspector General for Investigations, U.S. Department of Energy, Forrestal Building, Room 5B-250, 1000 Independence Avenue, SW., Washington, DC 20585.

**NOTIFICATION PROCEDURES:**

The Department of Energy has exempted the system from this requirement. See the Exemption section of this notice.

**RECORD ACCESS PROCEDURES:**

Same as Notification Procedures above.

**CONTESTING RECORD PROCEDURES:**

Same as Notification Procedures above.

**RECORD SOURCE CATEGORIES:**

Subject individuals; individuals and organizations that have pertinent knowledge about the subject; those authorized by the individual to furnish information; confidential informants; FBI; and other Federal, State, and local agencies.

**SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

Under subsection (j)(2) of the Privacy Act, this system has been exempted from the following subsections:

- 5 U.S.C. 552a(c) (3) and (4)
- 5 U.S.C. 552a(d)
- 5 U.S.C. 552a(e) (1), (2), and (3)
- 5 U.S.C. 552a(e) (4) (G) and (H)
- 5 U.S.C. 552a(e) (5) and (8)
- 5 U.S.C. 552a(f)
- 5 U.S.C. 552a(g)

See DOE's Privacy Act regulation at 10 CFR 1008.12(a), 45 FR 61576, 61582, September 16, 1980. This section applies to information in the system that relates to criminal law enforcement and meets the criteria of the (j)(2) exemption.

Under subsections (k)(1), (2), and (5) of the Act, this system has been exempted from the following subsection:

- 5 U.S.C. 552a(c)(3)
- 5 U.S.C. 552a(d)
- 5 U.S.C. 552a(e)(1)
- 5 U.S.C. 552a(e)(4) (G) and (H)
- 5 U.S.C. 552a(f)

See DOE's Privacy Act regulation at 10 CFR 1008.12(b). This section applies to information in the system that meets the criteria of the (k) (2) and (5) exemptions.

The detailed reasons for the exemptions under 5 U.S.C. 552a (j) (2) and (k) (2) as applicable follow:

(1) 5 U.S.C. 552a(c)(3) requires that upon request, an agency must give an individual named in a record an accounting which reflects the disclosure of the record to other persons or agencies. This accounting must state the date, nature, and purpose of each disclosure of the record and the name and address of the recipient. The application of this provision would alert subjects of an investigation to the existence of the investigation or that such persons are subject of that investigation. Since release of such information to subjects of an investigation would provide the subjects with significant information concerning the nature of the investigation, it could result in the altering or destruction of documentary evidence, improper influencing of witnesses, and other activities that could impede or compromise the investigation.

(2) 5 U.S.C. 552a(c)(4), (d), (e)(4) (G) and (H), (f) and (g) relate to the following: An individual's right to be notified of the existence of records pertaining to such individual; requirements for identifying an individual who requests access to records; agency procedures relating to access to records and the content of information contained in such records;



and the civil remedies available to the individual in the event of adverse determinations by an agency concerning access to or amendment of information contained in record systems. This system is exempt from the foregoing provisions for the following reasons: To notify an individual at the individual's request of the existence of records in an investigative file pertaining to such individual or to grant access to an investigative file could interfere with investigative and enforcement proceedings, deprive co-defendants of a right to a fair trial or other impartial adjudication, constitute an unwarranted invasion of personal privacy of others, disclose the identity of confidential sources, and reveal confidential information supplied by these sources and disclose investigative techniques and procedures. As for the civil remedies provisions of (g), since DOE is claiming that this system of records is exempt from subsections (c) (3) and (4), (d), (e) (1), (2), and (3), (e)(4) (G) and (H), (e) (5) and (8), and (f) of the Act, the provisions of subsection (g) of the Act would be inapplicable and are exempted to the extent that this system of records will be exempted from those above-listed subsections of the Act.

(3) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute or Executive Order. An exemption from the foregoing is needed:

a. It is not always possible to detect relevance or necessity of specific information in the early stages of a criminal or other investigation.

b. Relevance and necessity are questions of judgment and timing. What appears relevant and necessary when collected may ultimately be determined to be unnecessary. It is only after the information is evaluated that the relevance and necessity of such information can be established.

c. In any investigation the Inspector General may obtain information concerning the violations of laws other than those within the scope of his jurisdiction. In the interest of effective law enforcement, the Inspector General should retain this information as it may aid in establishing patterns of criminal activity, and provide leads for those law enforcement agencies charged with enforcing other segments of criminal or civil law.

d. In interviewing persons, or obtaining other forms of evidence during an investigation, information may be supplied to the investigator which relates to matters incidental to the main

purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

(4) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of the provision would impair investigations of illegal acts, violations of the rules of conduct, violations of the merit system and any other misconduct for the following reasons:

a. In certain instances the subject of an investigation cannot be required to supply information to investigators. In those instances, information relating to a subject's illegal acts, violations of rules of conduct, or any other misconduct must be obtained from other sources.

b. Most information collected about an individual under investigation is obtained from third parties such as witnesses and informers. It is not always feasible to reply upon the subject of the investigation as a source for information regarding his activities.

c. The subject of an investigation will be alerted to the existence of an investigation if any attempt is made to obtain information from the subject. This could afford the individual the opportunity to conceal any criminal activities in order to avoid apprehension.

d. In an investigation it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful litigation.

(5) 5 U.S.C. 552a(e)(3) requires that an agency must inform the subject of an investigation who is asked to supply information of:

a. The authority under which the information is sought and whether disclosure of the information is mandatory or voluntary,

b. The purposes for which the information is intended to be used,

c. The routine uses which may be made of the information, and

d. The effects on the subject, if any, of not providing the requested information. The reasons for exempting this system of records from the foregoing provision are as follows:

(i) The disclosure to the subject of the investigation as stated in b. above would provide the subject with substantial information relating to the

nature of the investigation and could impede or compromise the investigation.

(ii) If the subject were informed of the information required by this provision, it could seriously interfere with undercover activities, require disclosure of undercover agents' identity and impair their safety, as well as impair the successful conclusion of the investigation.

(iii) Individuals may be contacted before the subject of an investigation during preliminary information gathering in investigations. Informing the individual of the matters required by this provision would hinder or adversely affect any present or subsequent investigations.

(6) 5 U.S.C. 552a(e)(5) requires that records be maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about an individual. Because the law defines "maintain" to include the collection of information, complying with this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment of its collection. In gathering information during the course of an investigation, it is not possible to determine this prior to collection of information. Facts are first gathered and then placed into a logical order which objectively proves or disproves criminal behavior on the part of the suspect. Material which may seem unrelated, irrelevant, incomplete, or untimely, may take on added meaning as an investigation progresses. The restrictions in this provision could interfere with the preparation of a complete investigative report.

(7) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record of such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. The notice requirement of this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

Reasons for exemptions under 5 U.S.C. 552a(k)(1):

(1) 5 U.S.C. 552a(c)(3) requires that an agency make accountings of disclosures of records available to individuals named in the records at their request. These accountings must state the date, nature, and purpose of each disclosure of the record and the name and address of the recipient. The application of this provision would alert subjects of an investigation to the existence of the



investigation and that such persons are subjects of that investigation. Such information, if known, might be harmful to national security.

(2) 5 U.S.C. 552a(d), (e)(4) (G) and (H), and (f) relate to the following: An individual's right to be notified of the existence of records pertaining to such individual; requirements for identifying an individual who requests access to records; and agency procedures relating to access to records and the content of information contained in such records. This system is exempt from the foregoing provisions for the following reasons: To notify an individual at the individual's request of the existence of records in an investigative file pertaining to such individual or to grant access to an investigative file could interfere with investigations undertaken in connection with national security; or could disclose the identity of sources kept secret to protect national security or reveal confidential information supplied by these sources.

(3) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute or Executive Order. An exemption from the foregoing is needed when:

a. It is not always possible to detect relevance or necessity of specific information in the early stages of an investigation involving national security matters.

b. Relevance and necessity are questions of judgment and timing. What appears relevant and necessary when collected may ultimately be determined to be unnecessary. It is only after the information is evaluated that the relevance and necessity of such information can be established.

c. In any investigation the Inspector General may obtain information concerning the violators of laws other than those within the scope of his jurisdiction. In the interest of effective law enforcement, the Inspector General should retain this information as it may aid in establishing patterns of criminal activity and provide leads for those law enforcement agencies charged with enforcing other segments of criminal or civil war.

d. In interviewing persons or obtaining other forms of evidence during an investigation, information may be supplied to the investigator which relates to matters incidental to the main purpose of the investigation but which also relates to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

Reasons for exemptions under 5 U.S.C. 552a(k)(5)

(1) 5 U.S.C. 552a(c)(3) requires that an agency make accountings of disclosures of record available to individuals named in the records at their request. These accountings must state the date, nature and purpose of each disclosure of the record and the name and address of the recipient. The application of this provision would alert subjects of an investigation to the existence of the investigation. Since release of such information to subjects of an investigation would provide the subjects with significant information concerning the nature of the investigation, it could result in the altering or destruction of documentary evidence, improper influencing of witnesses, and other activities that could impede or compromise the investigation.

(2) 5 U.S.C. 552(d), (e)(4) (G) and (H), and (f) relate to the following: An individual's right to be notified of the existence of records pertaining to such individual; requirements for identifying an individual who requests access to records; and the agency procedures relating to access to records and the content of information contained in such records. This system is exempt from the foregoing provisions for the following reasons: To notify an individual at the individual's request of the existence of records in an investigative file pertaining to such individual or to grant access to an investigative file could interfere with investigative and enforcement proceedings; could interfere with co-defendant's right to a fair trial; could constitute an unwarranted invasion of personal privacy of others; could disclose the identity of confidential sources and reveal confidential information supplied by these sources; and could disclose investigative techniques and procedures.

(3) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual that is relevant and necessary to accomplish a purpose of the agency required by statute or Executive Order. An exemption from the foregoing is needed when:

a. It is not always possible to detect relevance or necessity of specific information in the early stages of an investigation.

b. Relevance and necessity are questions of judgment and timing. What appears relevant and necessary when collected may ultimately be determined to be unnecessary. It is only after the information is evaluated that the relevance and necessity of such information can be established.

c. In any investigation the Inspector General may obtain information concerning the violations of laws other than those within the scope of his jurisdiction. In the interest of effective law enforcement, the Inspector General should retain this information as it may aid in establishing patterns of criminal activity and provide leads for those law enforcement agencies charged with enforcing other segments of criminal or civil law.

d. In interviewing persons, or obtaining other forms of evidence during an investigation, information may be supplied to the investigator which relates to matters incidental to the main purpose of the investigation, but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated.

[FR DOC. 92-8329 Filed 4-9-92; 8:45 am]

BILLING CODE 8450-01

## Energy Information Administration

### Agency Information Collections Under Review by the Office of Management and Budget

**AGENCY:** Energy Information Administration, Energy.

**ACTION:** Notice of request submitted for review by the Office of Management and Budget.

**SUMMARY:** The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (Pub. L. No. 96-511, 44 U.S.C. 3501 *et seq.*). The listing does not include collections of information contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (a DOE component which term includes the Federal Energy Regulatory Commission (FERC)); (2) Collection number(s); (3) Current OMB docket number (if applicable); (4) Collection title; (5) Type of request, e.g., new, revision, extension, or reinstatement; (6) Frequency of collection; (7) Response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) Affected public; (9) An estimate of the number of



respondents per report period; (10) An estimate of the number of responses per respondent annually; (11) An estimate of the average hours per response; (12) The estimated total annual respondent burden; and (13) A brief abstract describing the proposed collection and the respondents.

**DATES:** Comments must be filed by May 11, 1992. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395-3084. (Also, please notify the EIA contact listed below.)

**ADDRESSES:** Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards at the address below.)

**FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT:** Jay Casselberry, Office of Statistical Standards, (E1-73), Forrestal Building, U.S. Department of Energy, Washington, DC 20585. Mr. Casselberry may be telephoned at (202) 254-5348.

**SUPPLEMENTARY INFORMATION:** The energy information collection submitted to OMB for review was:

1. Energy Information Administration.
2. EIA-1, 3, 4, 5, 6, 7A, and 20.
3. 1905-0167.
4. Coal Program Package.
5. Revision—The EIA-1, 4, and 20 are being activated due to the threat of a coal strike. Data will be used to monitor the impact and to report to Congress. The data will also be provided to the Department of Labor, the lead Federal agency in the event of a coal strike.
6. Weekly, Quarterly, Annually, and Other (Standby).
7. Mandatory.
8. Businesses or other for-profit.
9. 7,866 respondents.
10. 2.69 responses.
11. 1.347 hours per response.
12. 28,501 hours.
13. The coal surveys collect data on coal production, consumption, stocks, prices, imports and exports. Data are published in various EIA publications. Respondents are manufacturing plants, producers of coke, purchasers and distributors of coal, coal mining operators, and coal-consuming electric utilities.

**Statutory Authority:** Sec. 5(a), 5(b), 13(b), and 52, Pub. L. No. 93-275. Federal Energy Administration Act of 1974, 15 U.S.C. 764(a), 764(b), 772(b), and 790a.

Issued in Washington, DC, April 2, 1992.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 91-8334 Filed 4-9-91; 8:45 am]

BILLING CODE 6450-01-M

## Federal Energy Regulatory Commission

[Docket Nos. ER92-414-000, 3 et al.]

### Tampa Electric Company, et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

April 1, 1992.

Take notice that the following filings have been made with the Commission:

#### 1. Tampa Electric Co.

[Docket No. ER92-414-000]

Take notice that on March 27, 1992, Tampa Electric Company (Tampa Electric) tendered for filing revised Service Schedule A and B, providing for Emergency and Scheduled/Short-Term Firm Interchange Service, respectively, between Tampa Electric and the Reedy Creek Improvement District (RCID). The revised service schedules would supersede the existing Service Schedule A and B under the contract for interchange service between Tampa Electric and RCID.

Tampa Electric also tendered a Letter Agreement between Tampa Electric and RCID that amends an existing Letter of Commitment to provide for the sale of supplemental capacity and energy from the coal-fired generating resources at Tampa Electric's Big Bend Station. The Letter Agreement is tendered as a supplement to Service Schedule D (Long-Term Interchange Service) under the contract for interchange service.

Tampa Electric proposes an effective date of April 1, 1992, for the Service Schedules A and B and Letter Agreement, and therefore requests waiver of the Commission's notice requirements.

Copies of the filing have been served on RCID and the Florida Public Service Commission.

*Comment date:* April 15, 1992, in accordance with Standard Paragraph E at the end of this notice.

#### 2. Tampa Electric Co.

[Docket No. ER92-319-000]

April 1, 1992.

Take notice that on March 27, 1992, Tampa Electric Company (Tampa

Electric) tendered for filing an amendment to its prior submittal of an Agreement to Provide Qualifying Facility Transmission Service between Tampa Electric and Seminole Fertilizer Corporation (Seminole Fertilizer).

Tampa Electric proposes an effective date for the Agreement of the earlier of October 1, 1992, or the in-service date of the power sale contract between Seminole Fertilizer and Florida Power Corporation.

Copies of the filing have been served on Seminole Fertilizer and the Florida Public Service Commission.

*Comment date:* April 15, 1992, in accordance with Standard Paragraph E at the end of this notice.

#### 3. Niagara Mohawk Power Corp.

[Docket No. ER92-413-000]

April 1, 1992.

Take notice that Niagara Mohawk Power Corporation (Niagara Mohawk), on March 27, 1992, tendered for filing an agreement between Niagara Mohawk and Rochester Gas and Electric Corporation (RG&E) dated March 18, 1992.

The March 18, 1992 agreement is to provide for the sale by Niagara Mohawk Power Corporation of short term capacity and related energy to Rochester Gas and Electric Corp. The terms of this agreement and the period during which the purchase of short term capacity can occur shall commence on March 27, 1992 and shall continue until May 20, 1992.

Copies of this filing were served upon RG&E and the New York State Public Service Commission.

*Comment date:* April 15, 1992, in accordance with Standard Paragraph E at the end of this notice.

#### 4. Public Service Co. of New Mexico

[Docket No. ER92-416-000]

April 1, 1992.

Take notice that on March 30, 1992, Public Service Company of New Mexico (PNM) submitted for filing a 1992-1995 Power Sale Agreement (Agreement) between Imperial Irrigation District (IID) and PNM. Under the terms provided for in the Agreement, PNM will provide IID with year-round base service and, in April through October of each contract year, summer service. Base service will be made available in each calendar month (from June 1, 1992 through February 28, 1995) up to a maximum delivery rate of 56 megawatts. Summer service will be made available during the months of April through October of each calendar year (beginning in June of



1992 and ending October of 1994) up to a maximum delivery rate of 25 megawatts.

Copies of the filing have been served upon IID and the New Mexico Public Service Commission.

*Comment date:* April 15, 1992, in accordance with Standard Paragraph E at the end of this notice.

#### 5. Entergy Services, Inc.

Docket No. ER92-418-000]

April 1, 1992.

Take notice that on March 30, 1992, Entergy Services, Inc. (ESI) acting as agent for Arkansas Power & Light Company (AP&L) submitted for filing the Eighteenth Amendment to the Power Coordination, Interchange and Transmission Service Agreement between AP&L and Arkansas Electric Cooperative Corporation (AECC). The Amendment provides for an increase in contract capacity at six points of delivery, a decrease at four points of delivery and modified effective delivery dates at four points of delivery.

ESI requests that the Commission waive any requirements with which ESI has not already complied.

*Comment date:* April 15, 1992, in accordance with Standard Paragraph E end of this notice.

#### 6. Delmarva Power & Light Co.

[Docket No. ER92-236-002]

April 1, 1992.

Take notice that on March 19, 1992, Delmarva Power & Light Company (Delmarva) tendered for filing its compliance filing in the above-referenced docket.

*Comment date:* April 15, 1992, in accordance with Standard Paragraph E at the end of this notice.

#### Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-8289 Filed 4-9-92; 8:45 am]

BILLING CODE 6717-01-M

#### Application Filed With the Commission

April 6, 1992.

Take notice that the following hydroelectric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection.

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 11218-000.

c. *Date filed:* December 19, 1991.

d. *Applicant:* City of St. George.

e. *Name of Project:* Pine Valley.

f. *Location:* On the City of St. George's water supply pipeline, in Washington County, Utah. Township 41S Range 15W.

g. *Filed Pursuant to:* Federal Power Act 16 USC §§ 791(a)-825(r).

h. *Applicant Contact:* Mr. Wayne McArthur, City of St. George, 175 East 200 North, St. George, UT 84770, (801) 634-5800.

i. *FERC Contact:* Michael Spencer at (202) 219-2846.

j. *Deadline Date:* See attached paragraph D4.

k. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time—see attached paragraph D4.

l. *Description of Project:* The proposed project would consist of: (1) A connection to the existing 16-inch-diameter municipal water supply pipeline; (2) a powerhouse containing a generating unit with a capacity of 600 kW and an estimated average annual generation of 3.39 GWh.

m. *Purpose of Project:* Power will be used by the City.

n. *This notice also consists of the following standard paragraphs:* A2, A9, B1, and D4.

o. *Available locations of Application:* A copy of the application, as amended and supplemented, is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 941 North Capitol Street, NE., room 3104, Washington, DC 20426, or by calling (202) 208-1371. A copy is also available for inspection and reproduction with the applicant contact listed above.

A2. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular

application, the competing development application or a notice of intent to file such an application. Submitting a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for a preliminary permit will not be accepted in response to this notice.

A9. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

B1. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedures, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified comment date for the particular application.

D4. *Filing and Service of Responsive Documents*—The application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to section 4.34(b) of the regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108 (May 20, 1991)), that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008.

All filings must: (1) Bear in all capital letters the title "PROTEST," "MOTION TO INTERVENE," "NOTICE OF INTENT TO FILE COMPETING APPLICATION," "COMPETING



## APPLICATION," "COMMENTS,"

## "REPLY COMMENTS,"

## "RECOMMENDATIONS," "TERMS AND CONDITIONS," OR

## "PRESCRIPTIONS;" (2) set forth in the

heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. An additional copy must be sent to: Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, room 1027, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b), 385.2010.

Lois D. Cashell,  
Secretary.

[FR Doc. 92-8288 Filed 4-9-92; 8:45 am]

BILLING CODE 6717-01-M

### Application Filed With the Commission

April 8, 1992.

Take notice that the following hydro-electric application has been filed with the Federal Energy Regulatory Commission and is available for public inspection.

*a. Type of Application:* New Major License.

*b. Project No.:* 2422-004.

*c. Date filed:* October 6, 1992.

*d. Applicant:* James River-New Hampshire Electric, Inc.

*e. Name of Project:* Sawmill Project.

*f. Location:* On the Androscoggin River, Coos County, New Hampshire.

*g. Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)-825(r).

*h. Applicant Contact:* Mr. George W. Hill, James River-New Hampshire Electric, Inc., 650 Main Street, Berlin, NH 03570-2489, (603) 752-4600.

*i. FERC Contact:* Mary Golato (dt)

(202) 219-2804.

*j. Comment Date:* 60 days from the issuance date of this notice.

*k. Description of Project:* The proposed project's principal features consist of the following: (1) An existing 720-foot-long dam; (2) an existing impoundment with a surface area of about 72.5 acres, a storage capacity of about 620 acre-feet, and a normal pool elevation of 1,094.5 feet mean sea level (msl); (3) an existing powerhouse equipped with four turbine-generators having a total rated capacity of 3,174 kilowatts; (4) an existing tailrace channel; (5) an existing transmission line of about 1,800 feet long; and (6) appurtenant facilities. The owner of the dam is the James River-New Hampshire Electric Company.

The applicant is not proposing any changes to the existing project works as licensed. The applicant estimates the average annual generation would be 17.85 gigawatt-hours and owns all existing project facilities.

The existing project would also be subject to Federal takeover under Section 14 and 15 of the Federal Power Act. Based on the license expiration of December 31, 1993, the applicant's estimated net investment in the project would amount to \$2,158,000.00.

1. Pursuant to § 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the issuance date of this notice and serve a copy of the request on the applicant.

Lois D. Cashell,

Secretary.

[FR Doc. 92-8292 Filed 4-9-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ES92-36-000]

### Old Dominion Electric Cooperative; Application

April 3, 1992.

Take notice that on April 2, 1992, Old Dominion Electric Cooperative ("Applicant") filed an application seeking an order under section 204(a) of the Federal Power Act authorizing the Applicant to issue and sell up to and including \$900 Million of Debt Securities and an exemption from the Commission's competitive bidding

requirements, such sales to commence as set out in Applicant's filing.

Any person desiring to be heard or to protest said application should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC, 20426, in accordance with Rule 211 or Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 or 385.214. All such petitions or protests should be filed on or before April 20, 1992. Protests will be considered in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party to this proceeding should file a petition to intervene. Copies of the application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-8290 Filed 4-9-92; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER92-432-000]

### Old Dominion Electric Cooperative; Initial Rate Filing

April 3, 1992.

Take notice that Old Dominion Electric Cooperative ("Old Dominion"), on April 2, 1992, tendered for filing an initial rate tariff pursuant to Section 205 of the Federal Power Act and Section 35.12 of the regulations of the Federal Energy Regulatory Commission ("FERC" or "Commission").

Pursuant to the Rate Tariff, Old Dominion will provide firm wholesale power service for resale to the following member cooperative customers:

#### All-Requirements Customers

A&N Electric Cooperative,  
BARC Electric Cooperative,  
Choptank Electric Cooperative,  
Community Electric Cooperative,  
Delaware Electric Cooperative,  
Mecklenburg Electric Cooperative,  
Northern Neck Electric Cooperative,  
Northern Virginia Electric Cooperative,  
Prince George Electric Cooperative,  
Rappahannock Electric Cooperative,  
Shenandoah Valley Electric Cooperative,  
Southside Electric Cooperative.

The Rate Tariff consists of Amended and Restated Wholesale Power Contracts, under which Old Dominion will provide the above-listed customers with electric service, pursuant to a comprehensive cost of service rate formula. Old Dominion requests that its



Rate Tariff be made effective upon closing of the financial transaction by which Old Dominion retires its Rural Electrification Administration debt.

Old Dominion states that it has served copies of this filing on each of its wholesale customers, the Virginia State Corporation Commission, the Maryland Public Service Commission, the Delaware Public Service Commission, the Public Service Commission of West Virginia, the Rural Electrification Administration and the Bear Island Paper Company.

Any person desiring to be heard or to protest said application should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 or 384.214. All such petitions or protests should be filed on or before April 20, 1992. Protests will be considered by the Commission in determining the appropriate action be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party in this proceeding should file a petition to intervene. Copies of the application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 92-8291 Filed 4-9-92; 8:45 am]

BILLING CODE 6717-01-M

## Office of Conservation and Renewable Energy

### Renewable Energy and Energy Efficiency Joint Ventures Advisory Committee; Open Meeting

Under the Federal Advisory Committee Act (Pub. L. 92-463; 86 Stat. 770), notice is hereby given of the follow meeting:

**Name:** Renewable Energy and Energy Efficiency Joint Ventures Advisory Committee (REEJ/VAC).

**Date and Time:** April 27, 1992, 9 a.m.-5 p.m.

**Place:** The Madison Hotel, 15th and M Streets, NW., Washington, DC.

**Contact:** Elaine Guthrie, Office of Technical Assistance (CE-54), Conservation and Renewable Energy, U.S. Department of Energy, Washington, DC 20585, Telephone: 202/586-1719.

**Purpose of Committee:** To advise the Secretary of Energy on the development of the solicitation and evaluation criteria for joint ventures, and on otherwise carrying out his responsibilities under the Renewable Energy and Energy Efficiency Technology Competitiveness Act of 1989 (Pub. L. 101-218, 42 U.S.C. 12005).

**Tentative Agenda:** Briefings and discussions of:

Recap of Events Since Last Meeting;  
Status of DOE's Implementation of Advisory Committee's Recommendations;  
Regulatory and Legal Questions;  
Defining the Committee's Ongoing Role;  
Assignments for and Roles of Subcommittees;  
Additional Recommendations on Joint Venture Implementation;  
Other Matters Requiring Board Consideration and Public Comment Period (10 minute rule).

**Public Participation:** The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Elaine Guthrie at the address or telephone number listed above. Requests to make oral presentations must be received 5 days prior to the meeting; reasonable provision will be made to include the statement in the agenda. The Chairperson of the Committee is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

**Transcripts:** The transcript of the meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room IE-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on April 6, 1992.

Marcia L. Morris,

Deputy Advisory Committee Management Officer.

[FR Doc. 92-8333 Filed 4-9-92; 8:45 am]

BILLING CODE 6450-01-M

## Office of Energy Research

### Special Research Grant Program Notice 92-12: Radiological and Chemical Physics Research

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice inviting grant applications.

**SUMMARY:** The Office of Health and Environmental Research (OHER) of the Office of Energy Research (ER), U.S. Department of Energy announces its interest in receiving applications for Special Research Grants in support of the Radiological and Chemical Physics Program (RCPP). RCPP is a comprehensive multi-disciplinary program which attempts to elucidate and understand in detail initial physical and chemical interactions between biomolecules and ionizing radiation and chemicals. This information is utilized to determine the mechanisms of biological action induced by environmental agents such as ionizing radiation and

chemicals. This notice especially encourages the submission of theoretical and experimental applications which will focus on dynamics and associated changes of structure of biomolecules under the action of initial events such as ionizations, molecular excitations and free radicals. The influence of these structural changes with time in the natural environment of the cell will be an important area of study. However, similar studies concerned with elucidating the mechanisms in model systems are also sought. Research applications associated with developing models to connect the initial and progressive structural changes with specific biological activity will also be of interest to DOE.

Before preparing a formal application, potential applicants are encouraged to submit a brief re-application in accordance with 10 CFR 600.10(d)(2), which consists of two to three pages of narrative describing research objectives and methods of accomplishment. These will be reviewed relative to the scope and research needs of the Radiological and Chemical Physics Program. Preapplications referencing Program Notice 92-12 should be received by May 1, 1992, and sent to Dr. Matresh N. Varma, Office of Health and Environmental Research, ER-73, Washington, DC 20585, (301) 903-3209. Telephone and telefax numbers are required to be a part of the preapplication. A response to the preapplications discussing the potential program relevance of a formal application will be communicated by June 1, 1992.

**DATES:** Formal applications submitted in response to this notice must be received by the Acquisition and Assistance Management Division by 4:30 p.m., e.d.t. July 15, 1992, to be accepted for a September review and to permit timely consideration for award in Fiscal Year 1993.

**ADDRESSES:** Formal applications referencing program notice 92-12 should be forwarded to: U.S. Department of Energy, Office of Energy Research, Acquisition and Assistance Management Division, ER-64, Room G-236, Washington, DC 20585. Attn: Program Notice 92-12. The following address must be used when submitting applications by U.S. Postal Service Express, any commercial mail delivery service, or when handcarried by the applicant: U.S. Department of Energy, Acquisition and Assistance Management Division, ER-64, 19901 Germantown Road, Germantown, Maryland 20874.



**FOR FURTHER INFORMATION CONTACT:** Dr. Matesh N. Varma, Office of Health and Environmental Research, ER-73, U.S. Department of Energy, Washington, DC 20585, (301) 903-3209.

**SUPPLEMENTARY INFORMATION:** DOE is interested in receiving research applications focused on the study of initial physical and chemical events produced by interaction of ionizing radiation with biomolecules, and influence of these events on changes in structure of these biomolecules. Also, applications dealing with developing models that connect initial and progressive structural changes with biological activity will be of interest to DOE.

It is anticipated that approximately \$1 million will be available for grant awards during FY 1993 contingent upon availability of appropriated funds. Funding of awards beyond 1993 is also contingent upon availability of funds. Information about development and submission of applications, eligibility limitations, evaluation and selection process and other policies and procedures may be found in the ER Application and Guide for the Special Research Grants Program 10 CFR part 605. The applications kit and guide is available from the U.S. Department of Energy, Acquisition and Assistance Management Division, Office of Energy Research, ER-64, Washington, DC 20585. Telephone requests may be made by calling (301) 903-5349 or FTS 233-5349. The Catalog of Federal Domestic Assistance Number for this program is 81.049.

D.D. Mayhew,

*Deputy Director for Management, Office of Energy Research.*

[FR Doc. 92-8331 Filed 4-9-92; 8:45 am]

BILLING CODE 6450-01-M

#### **Special Research Grant Program Notice 92-15; University Reactor Sharing Program**

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice inviting grant applications.

**SUMMARY:** The Office of Energy Research (ER) of the Department of Energy in keeping with its energy-related mission to strengthen the Nation's support of science, engineering and mathematics education at all levels of education, announces its interest in receiving special research grant applications for the support of the University Reactor Sharing Program. The purpose of this program is to provide funds to U.S. colleges or universities with nuclear reactor

facilities (host institutions) that cover reactor operating costs when the facilities are utilized by regional affiliates (user institutions) for student instruction or for student or faculty research. In accordance with 10 CFR 600.7(b)(1), eligibility for these grants is restricted to U.S. colleges and universities with nuclear reactor facilities because they provide a unique opportunity to address important aspects of the Nation's nuclear science and engineering educational programs. It is anticipated that approximately \$650,000 will be available for support of this program during fiscal year 1992.

**DATES:** Applications for grants under this notice should be received by 4:30 p.m., Eastern local time, May 14, 1992.

**ADDRESSES:** Application kits and guides are available from: U.S. Department of Energy, Office of University and Science Education Programs, ER-80, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-8949. Completed applications must be submitted to: U.S. Department of Energy, Office of Energy Research, Acquisition and Assistance Management Division, ER-64, Washington, DC 20585. The following address must be used when submitting applications by U.S. Postal Service Express, any commercial mail delivery service, or when handcarried by the applicant: U.S. Department of Energy, Office of Energy Research, Acquisition and Assistance Management Division, ER-64, 19901 Germantown Road, Germantown, MD 20874. Each application must reference Notice No. 92-15. Telephone and telefax numbers must also be included in any application.

**FOR FURTHER INFORMATION CONTACT:** Dr. Larry Barker, Program Manager, U.S. Department of Energy, Office of Energy Research, University and Science Education Programs, ER-80, Washington, DC 20585, (202) 586-8949.

**SUPPLEMENTARY INFORMATION:** This program provides funding to host institutions to cover expenses associated with operation of their nuclear reactor facility for the benefit of user institutions to promote education, training or research opportunities. University reactors are extremely versatile neutron sources and research facilities; thus the availability of a nuclear reactor contributes particularly and significantly to research and educational opportunities at both the graduate, undergraduate and precollege levels. Any U.S. educational institution which operates a research or training reactor may submit an application for a new or renewal award. However, those host institutions applying that have a

substantial number of user institutions indicating continued or new interest in the project are more likely to be selected than those applicants who do not have sufficient numbers of user institutions. User groups affiliated with the host institution are not considered eligible for participation in this program. Projects may range from tours, demonstrations, experiments, workshops and seminars for middle school and high school groups to faculty research projects and MS/Ph.D. thesis or dissertation research. Reactor utilization may range from simple service irradiations and analytical support to basic research studies requiring the facilities' most sophisticated equipment. Each application must include under the "Project Description" portion information on the relative availability of the reactor to outside users, an assessment on a regional basis of the colleges, universities and/or precollege institutions that can be served by the proposing institution's reactor facility and provide evidence of interest on the part of potential or former user institutions to utilize the applicant's reactor facility during the proposed grant period. Allowable costs under this program include: (1) Payments for irradiation services not to exceed the established, published schedule of the host institution; (2) payments for use of the reactor and related facilities based upon established rates of the host institution; (3) cost of technical assistance furnished by the host institution for conduct of studies by a user institution; and (4) cost of materials and supplies consumed in user institution projects. Unallowable costs under this program include: (1) Normal operating expenses of the facility; (2) laboratory apparatus and instrumentation; (3) costs that are covered by existing grant or contract; and (4) indirect or overhead costs. Funds for individual or group travel or subsistence will not be allowed except in highly unusual situations. During fiscal year 1992, DOE anticipates that the number of awards to be issued and the amount of each award will depend upon the number of approved applications, the amount of funds requested and the total DOE funds made available for this program. It is anticipated that \$500,000 will be available from DOE's Office of Energy Research and that approximately \$150,000 will be made available from DOE's Office of Environmental Restoration and Waste Management (EM). Awards may range from \$5,000 to \$100,000 per year.



Separate applications seeking support from funds made available by EM must be submitted to the address in the address section of this notice, and must specifically speak to the pre-college education community with a focus on the needs of teachers in meeting their teaching responsibilities in this programmatic area. Topical areas of interest for the EM applications include: introduction to nuclear concepts; radiation and its detection; interactions of radiation with matter; health physics orientation; decontamination and decommissioning; environmental impact statements; the national environmental policy; nuclear applications in industry, medicine and science; energy technologies (i.e., oil, gas, coal, nuclear, solar, wind, and geothermal); additionally, areas under environmental aspects of energy technologies and waste operation which include waste types, transportation, site assessment, treatment, storage and disposal.

A combination of selected, or all of the above, topical areas would be appropriate for this pre-college education effort. In preparing an application, the target audience should be identified and achievement goals set that will provide teachers with necessary knowledge and information to meet their respective teaching responsibilities; i.e., science vs. non-science teachers, grade level, etc. Any questions regarding the environmental restoration and waste management applications may be discussed with Ms. Carrie Wildman of EM on (301) 903-7924.

Information about submission of applications, eligibility, limitations, evaluation and selection processes, and other policies and procedures may be found in the ER Application Guide for the Special Research Grants Program and 10 CFR part 605. The application kit and grade is available from the U.S. Department of Energy, Acquisition and Assistance Management Division, Office of Energy Research, ER-64, Washington, DC 20585. Telephone requests may be made by calling (202) 586-8949. The Catalog of Federal Domestic Assistance Number for this program is 81.049.

Issued in Washington, DC, on March 31, 1992.

D.D. Mayhew,

Deputy Director for Management, Office of Energy Research.

[FR Doc. 92-8326 Filed 4-9-92; 8:45 am]

BILLING CODE 6450-01-M

### Special Research Grant Program Notice 92-11; University Reactor Instrumentation Program

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice inviting grant applications.

**SUMMARY:** The Office of Energy Research (ER) of the Department of Energy in keeping with its energy-related mission to strengthen the Nation's support of science, engineering and mathematics education at all levels of education, announces its interest in receiving special research grant applications for the support of the University Reactor Instrumentation Program. The purpose of this program is to support needs of U.S. academic communities in modernizing and improving their nuclear reactors which are used for training and research. Approximately \$1 million from fiscal year 1992 funds have been allocated for grant awards to those eligible colleges and universities with operating nuclear reactors dedicated to research, training and service. Future year funding will be contingent upon the availability of appropriated funds.

**DATES:** Applications for grants under this notice must be received by 4:30 p.m., Eastern local time, May 14, 1992.

**ADDRESSES:** Application kits and guides are available from the Office of University and Science Education Programs, ER-80, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-8949. The completed applications must be submitted to: U.S. Department of Energy, Office of Energy Research, Acquisition and Assistance Management Division, ER-64, Washington, DC, 20585. The personal or courier delivery address is: U.S. Department of Energy, Acquisition and Assistance Management Division, ER-64, Office of Energy Research, 19901 Germantown Road, Germantown, MD 20874. Each application submitted must reference Notice No. 92-11. Telephone and telefax numbers must also be included in any application.

**FOR FURTHER INFORMATION CONTACT:** Dr. Larry Barker, Program Manager, Office of University and Science Education Programs, ER-80, Office of Energy Research, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC, 20585, (202) 586-8947.

**SUPPLEMENTARY INFORMATION:** The University Reactor Instrumentation Program was developed to provide support for modernization and improvement of the research and training reactor at U.S. colleges and

universities. In accordance with 10 CFR 600.7(b)(1) it has been determined that eligibility for these grants is restricted to U.S. colleges and universities with operating nuclear reactors dedicated to research, training and service of the scientific community. The purpose for restricting eligibility to these applicants only is derived from the intent of the program which is to provide funds for modernizing and improving research and training reactors and the fact that reactors are general purpose laboratory facilities, useful in teaching nuclear science at all levels from pre-college through graduate school. In addition, this support will facilitate training for various reactor operating skills required by industry and the government.

Two general categories of equipment and instrumentation will be considered under this program. They include: (1) Equipment and instrumentation relating to the performance, operating capability and control to the reactor including radiation detection or monitoring equipment; and (2) equipment or instrumentation that will significantly improve or expand the research/training capability of the facility. Applications may include more than one item of equipment or instrumentation; however, they must be listed in order of priority. Detailed information regarding the cost or price of equipment or instrumentation must be included as part of the required budget narrative section of the application. Applications may also be broken into phases for funding at a later date dependent upon availability of resources. Support will not be provided for faculty or staff salaries, facility operating costs, fees or profit. The project description portion of the application must include information on the following activities (items 1 and 2 are the most critical): (1) The potential of the new equipment or instrumentation to increase the quality and/or efficiency of operation of the reactor facility; (2) the potential of the new equipment or instrumentation to significantly improve or expand the research or training capability of the facility; (3) the potential of the new equipment or instrumentation to enhance and/or modernize safety related systems within the reactor facility; (4) the number of students pre-college through graduate and faculty using as well as supported by the facility; and (5) the amount and type of research or service being provided by the facility to other departments, universities, industry or U.S. Government Agencies during the past five years. A brief description and statement of qualifications of the reactor facility staff should also be provided.



Selection for award decisions by DOE will take into consideration information provided regarding the applicant's willingness to share in the total cost of the project.

It is anticipated that \$1M will be available for this activity. Awards may range from \$5,000 to \$250,000 per year. The number of awards will be determined from the number of approved applications submitted under this notice and the funds available at time of award. However, DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted. Additional information may be subsequently requested by DOE during evaluation of a submitted application. General information about development and submission of applications, eligibility, limitations, evaluation and selection processes, and other policies and procedures are contained in the ER Special Research Grant Application Kit and Guide and 10 CFR part 605. The catalog of Federal Domestic Assistance Number for this program is 81.049.

Issued in Washington, DC, on April 1, 1992.

**D.D. Mayhew,**

*Deputy Director for Management, Office of Energy Research.*

[FR Doc. 92-8327 Filed 4-9-92; 8:45 am]

BILLING CODE 6450-01-M

## Office of Hearings and Appeals

### Final Refund Procedures

**AGENCY:** Office of Hearings and Appeals, Department of Energy.

**ACTION:** Implementation of Special Refund Procedures.

**SUMMARY:** The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the final procedures for the disbursement of \$121,187,430, plus interest obtained by the DOE as the result of the termination of exception relief granted to the 341 Tract Unit of the Citronelle Field. The OHA determined that refiners and other participants in the DOE Crude Oil Entitlements Program will be eligible to receive a portion of those funds. The OHA has provided those participants with an opportunity to file briefs and to participate in a hearing on the issue of the level of their absorption of Citronelle recertification costs. The OHA has further decided that a portion of the remaining funds be disbursed to end-users of refined petroleum products. The OHA will decide at a later date how any remaining funds will be disbursed.

**DATE AND ADDRESS:** Briefs regarding the issue of refiner absorption of

recertification costs must be filed by July 9, 1992, and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. Briefs should display a reference to Case Number LFX-0008.

### FOR FURTHER INFORMATION CONTACT:

Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586-2390.

### SUPPLEMENTARY INFORMATION:

Notice is hereby given of the issuance of a final Decision and Order that sets forth the procedures the OHA will use to disburse the escrowed funds which were received as a result of the termination of exception relief granted to the 341 Tract Unit of the Citronelle Field. The exception relief permitted the Unit to recertify a sufficient quantity of its prior production of price-controlled crude oil to produce \$63.8 million. With accrued interest, these funds total approximately \$121,187,430. The funds are presently deposited in an interest-bearing escrow account maintained at the United States Department of the Treasury.

The final Decision and Order considers comments of refiners, a group of States, Utilities, Cooperatives, and the Unit concerning the proposed disposition of those funds, as set forth in a Proposed Decision and Order issued on December 24, 1991 by the OHA.

Since the recertification by the Unit had the effect of raising per-barrel prices of crude oil to participants in the Entitlements Program, the OHA has decided that a portion of the escrowed funds should be reserved for refunds for those participants. The percentage of the escrowed funds that will be allocated to the participants will reflect the level of their absorption of the additional costs associated with the recertification. The OHA indicated in the final Decision that an absorption rate of 5.4 percent may well be an appropriate rate for the Entitlements Program participants as a whole. The OHA has provided for a 90 day period from the date of publication of this Notice in which these Entitlements Program participants may submit briefs regarding economic evidence on the absorption rate and on the methodology for dividing the Citronelle fund allocated to Entitlements Program participants among those participants. The OHA also provided for this same 90 day deadline for submission of individual refund applications by Entitlements Program participants that submit briefs regarding the absorption issue. There will be a 30

day period for filing responses to those briefs. The OHA also will convene a hearing on the absorption issue approximately 45 days after the responses are due. The OHA will establish a second filing date for Entitlements Program participants that wish to accept the absorption rate determined by the OHA and that do not submit briefs on that issue.

After the level of absorption by Entitlements Program participants is determined, a portion of the Citronelle fund will be disbursed to non-waiving participants in the Stripper Well refund proceeding and other end-users of refined petroleum products. The OHA will decide at a later date how any remaining funds should be disbursed.

Dated: April 3, 1992.

**Thomas L. Wieker,**

*Acting Director, Office of Hearings and Appeals.*

### Decision and Order of the Department of Energy

#### Implementation of Special Refund Procedures

April 3, 1992.

*Name of Case:* The 341 Tract Unit of the Citronelle Field.

*Date of Filing:* March 13, 1991.

*Case Number:* LFX-0008.

This Decision and Order sets forth procedures to be followed in the disbursement of an escrow fund now containing in excess of \$120 million. The funds in this escrow account originated when exception relief was approved for the 341 Tract Unit of the Citronelle Field (the Unit or Citronelle) by the Office of Hearings and Appeals (OHA). The exception relief was designed to reduce or eliminate the effect on the Unit of inequities caused by the DOE's tertiary recovery regulations as applied to the Unit, and it provided the Unit with funds to undertake a tertiary crude oil recovery project. Pursuant to that exception relief, which was granted in December 1980, the Unit recertified a sufficient quantity of its prior production of price-controlled crude oil to produce \$63.8 million, and that amount was placed in an interest-bearing escrow account with the Southtrust Bank of Mobile. The Unit was allowed to make withdrawals for expenses incurred in connection with its project. *Three Forty One Tract Unit of the Citronelle Field*, 10 DOE ¶ 81,027 (1983).

In a determination issued on December 24, 1991, the DOE announced that it had decided to terminate the relief and it directed that the funds be moved from the Southtrust Bank to an interest-bearing escrow account established with the United States Department of the Treasury. *The 341 Tract Unit of the Citronelle Field*, Case No. KEZ-0096, 56 FR 67312 (December 30, 1991) (Citronelle). The Department received these funds on February 18, 1992, and on that day placed them in the Petroleum Violations Escrow Account maintained at the Department of Treasury.



In *Citronelle* the DOE explained the basis for its determination that the entire escrow fund should be disbursed to parties who were adversely affected as a result of the Unit's recertification of the price-controlled crude oil. Locating those parties is not an easy matter. When the recertification occurred, the DOE's Crude Oil Entitlements Program operated to spread these additional costs throughout the nation. As a result, injured parties are difficult to identify and potentially numerous, a situation which is well suited to opening a special refund proceeding of the type utilized in the past for refunding oil overcharges. See 10 CFR part 205, subpart V. *Behm Family Corp. v. DOE*, 3 Fed. Energy Guidelines, ¶ 26,633 (Temp Emer. Ct. App. 1990) (*Behm*). Accordingly, on December 24, 1991, OHA issued a Proposed Decision and Order tentatively determining that a refund proceeding be held to identify those parties and to determine the amounts which they are entitled to receive. 56 Fed. Reg. 67310 (December 30, 1991). OHA sought comments on its determination.

#### I. The Proposed Decision and Order

As we stated in the Proposed Order, under the procedural regulations of the DOE the OHA is authorized to formulate and implement special refund procedures for the purpose of refunding monies collected by the DOE to those injured by actual or alleged violations of the DOE regulations. 10 CFR part 205, subpart V. This subpart is applicable to those situations in which the DOE is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, Remedial Order for Immediate Compliance, and Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive. 10 CFR 205.280.

We recognized in the Proposed Order that the funds involved in this proceeding originated with exception relief authorized by the DOE, and were not the result of a violation, or the subject of a Remedial Order, Order of Disallowance or Consent Order, as specified in our subpart V regulations. However, through the operation of the Entitlements Program, the \$63.8 million recertification by Citronelle did have the effect of raising crude oil costs throughout the United States in the same manner as if the crude oil in question were improperly certified at a higher price, in violation of DOE regulations. Therefore, we stated that the consequences of that recertification on the petroleum industry and on ultimate purchasers or refined petroleum products mimicked the effects of crude oil overcharge violations.

We therefore proposed that parties injured by the overall increases in crude oil costs caused by the Unit's recertification of price-controlled crude oil should have an opportunity to receive restitution from the escrowed funds. We indicated that a proceeding modeled after the type provided for at 10 CFR part 205, subpart V best permits us to accomplish that goal. Consequently, we stated that we would refer to the subpart V regulations in fashioning a proceeding for the purposes of identifying those parties and ascertaining the amounts they should receive.

We suggested that in general there are two classes of parties that incurred injury as a result of the Unit's recertification of the crude oil and that should be considered eligible to file applications and receive refunds directly from the escrowed monies: (i) Entities on the DOE Entitlements List (who are, for the most part, refiners); and (ii) end-users of refined petroleum products. We therefore proposed a bifurcated or two-stage proceeding. We stated our proposal to allocate a portion of the Citronelle escrow fund to refiners. The procedures we proposed for determining the funds to be allocated to the refiners and the method for disbursing the refiners' share of the fund are set forth immediately below. A discussion of the methodology proposed for disbursing the remaining monies will follow.

#### A. Refiners

Due to the operation of the Entitlements Program, the \$63.8 million recertification had the effect of raising the cost of crude oil to all crude oil purchasers on the entitlements list. Under the Entitlements Program, the direct purchaser of the crude oil recertified by the Unit automatically received additional entitlements benefits, which compensated it for its increased crude oil costs. Since the Entitlements Program generally operated to equitably distribute the cost burden of crude oil for all refiners, crude oil costs after entitlements obligations rose slightly nationwide in response to the recertification. *OHA Report on Stripper Well Overcharges*, 6 Fed. Energy Guidelines ¶ 90,507, section (V) at 90,618; section (VI)(B) at 90,640. Thus, no one purchaser ultimately bore all the cost of the recertification. Since crude oil costs rose by the same amount per barrel for all participants in the Entitlements Program, we believe that market prices for all refined products also tended to rise, and refiners as a group were thus generally able to recoup most of the cost of the recertification by the Unit. *Id.* at 90,640.

Nevertheless, we believe that refiners were not fully compensated for all increased costs associated with the recertification. In the Proposed Order we tentatively determined that refiners are thus eligible to receive a refund from these escrowed funds.

We recognized that determining the portion of the fund that should be allocated to refiners, as a group, would be a significant issue in this proceeding. In connection with the settlement of the Stripper Well Exemption Litigation, U.S. Federal District Court Judge Frank Theis directed the OHA to conduct fact-finding to try to determine who bore the impact of the overcharges involved in that litigation. In response to that Court directive, the OHA conducted lengthy hearings and issued a report. One of its conclusions was that refiners were generally able to pass through most increased costs, but that the class of refiners absorbed between 2.7 and 8.1 percent of the impact on them of overcharges involved in the stripper well litigation. *OHA Report on Stripper Well Oil Overcharges*, 6 Fed. Energy Guidelines at 90,640.

In the Proposed Order we tentatively decided to apply the same absorption rate that we found in the Stripper Well Report to the class of refiners in this refund proceeding.

Accordingly, we proposed that an average of the 2.7 and 8.1 percent absorption rates, or 5.4 percent of the monies in the Citronelle escrow account, be applied to the refiners for refund purposes. We also proposed that each refiner's proportionate share of the Citronelle fund would be the same as its proportionate share of the Stripper Well Refiners' escrow fund.

We emphasized that the absorption percentage was tentative. We pointed out that the crude oil recertification benefiting the Citronelle Unit was approved in late 1980. The Entitlements Program, along with the overall petroleum price control program regulating the price of crude oil and refined petroleum products, ended on January 27, 1981. As a result of the proximity between the decontrol date and the recertification, as well as the short notice provided to refiners regarding the recertification, the refiners' level of absorption of the increased crude oil costs may have been greater than the level we proposed. In view of this fact, we proposed that refiners be accorded the opportunity to present arguments and evidence in this refund proceeding to the effect that the absorption rate we proposed above should not be finally adopted, and that a higher rate is appropriate.

Specifically, we proposed that within 90 days from the date of publication in the *Federal Register* of a final Decision and the Order setting forth refund procedures in this matter, refiners be permitted to submit briefs and economic evidence on the issue of the proper refiner absorption rate. Refiners were encouraged to file joint submissions regarding their economic evidence of the level of absorption. The opportunity to file a submission on the issue of the absorption of additional crude oil costs was not limited to refiners. Any participant in the Entitlements Program was considered eligible to submit evidence regarding the economic absorption issue.

In addition, we proposed that same 90 day deadline for each respective refiner or other Entitlements Program Participant to submit its individual application for Refund from the Citronelle escrow fund. We stated that the application process itself in this proceeding would be streamlined. The refund application need only include the claimant's name, address, an authorizing signature and a statement to the effect that the claimant is applying to receive a share of the Refiners' Citronelle escrow fund. Claimants would not be required to submit economic evidence regarding an absorption rate. They may elect to submit an Application for Refund.

We further proposed that within 30 days of the day that the refiners' briefs and refund applications are due, interested parties may submit responses to the refiners' positions. We proposed to hold an evidentiary hearing regarding the refiner absorption issue 45 days thereafter.

#### B. Disbursement of Remaining Funds

We further concluded that the most appropriate method of disbursing the Citronelle funds not allocated to the refiners would be to refer to the DOE Modified Statement of Restitutionary Policy



Concerning Crude Oil Overcharges (MSRP). 51 FR 27899 (August 4, 1986).

The MSRP provides that crude oil overcharge funds will be divided among the States, the Federal Government and injured purchasers of refined petroleum products. Under the MSRP, up to 20 percent of these crude oil overcharge funds will be reserved initially to satisfy valid claims by injured purchasers of petroleum products. Funds not reserved for the end-user claims (at least 80 percent) and any monies remaining after all valid claims are paid are to be disbursed equally to the States and federal government for indirect restitution. We proposed to allocate the full 20 percent of the remaining Citronelle fund for the end-user claims process, since we believe that end-users are likely to have experienced significant effects from the Citronelle recertification. *Cf. Texaco Inc.*, 19 DOE ¶ 85,200 (1989), modified, 19 DOE ¶ 85,236 (1989). The claims filing procedures and standards that we proposed to use for end-user applicants are set forth in numerous cases, such as *Petrol Products, Inc.*, 20 DOE ¶ 85,436 (1990). We proposed that the remaining eighty percent be divided equally between the States and the Federal Government.

We invited interested parties to submit comments regarding these proposed procedures with respect to refiner claims and to the procedures applicable to the remainder of the Citronelle fund. We stated that comments must be filed within 30 days of the date of publication of this Proposed Decision and Order in the Federal Register. The Proposed Order was published in the Federal Register on December 30, 1991. The 30-day comment period has ended. We will now consider the comments received and issue a final Decision and Order in this matter.

## II. Comments Regarding the Proposed Order

We received comments regarding the Proposed Order from the following entities: (i) A group of refiners<sup>1</sup>; (ii) a group of utilities, transporters and manufacturers (Utilities);<sup>2</sup>

<sup>1</sup> The comments were submitted by Atlantic Richfield Company, Chevron U.S.A. Inc., Conoco, Inc., Exxon Company, U.S.A., Marathon Petroleum Company, Mobil Oil Company, OXY USA Inc., Shell Oil Company, Texaco Inc., Texaco Refinery & Marketing Inc., TOSCO Corporation, and Union Pacific Resources Company.

<sup>2</sup> The comments were filed on behalf of Consolidated Edison Company of New York, Long Island Lighting Company, Orange and Rockland Utilities, Inc., Pacific Gas and Electric Company, San Diego Gas and Electric Company, Southern California Edison Company (Utilities); Daiichi Chuo Kisen Kaisha, Flota Mercante Grancolombiana S.A., Globe Trade and Transport Company, Ltd., Island Navigation Corporation (Ship Management) Ltd., Japan Line Ltd., Kawasaki Kisen Kaisha, Mitsui O.S.K. Lines, Ltd., n.v. Bocimar, s.a., Nippon Yusen Kaisha, The Sanko Steamship Co., Ltd., Shinwa Kaiun Kaisha, Ltd., Showa Line Ltd., Star Shipping A/S, Yamashita-Shinnihon Steamship Co., Ltd., (Transporters); Champion International Corporation, Federal Paperboard Company, Inc., International Paper Company, Weyerhaeuser Company and Westvaco Corporation (Manufacturers).

(iii) a group of States;<sup>3</sup> (iv) the National Council of Farmer Cooperatives; and (v) the Citronelle Unit. We will consider in turn the comments of each group.

### A. The Refiners

The refiners raise a two-pronged argument in support of their position that they are entitled to receive the entire contents of the Citronelle escrow account. They believe first, that they were required to provide the financing for the tertiary project, and second, that the OHA has no legal authority to require them to show injury in order to receive the funds.

The refiners' assertion that they "provided the financing for the tertiary project," is flawed. The purpose of this Citronelle proceeding is to provide appropriate restitution to those who were adversely affected by the exception relief. The mere fact that the relief was funded through the Entitlements Program does not address the question of the extent to which the refiners actually bore the cost of the relief. It is undisputed that, if refiners passed through the cost of the exception relief to purchasers of refined products, the refiners did not bear the cost of the relief. Based on our findings in the Stripper Well proceeding concerning the degree to which refiners passed through increased crude oil costs, it is unreasonable to assume that the refiner bore more than a small percentage of the cost of the relief. The DOE has proposed that the absorption rate used in that proceeding be adopted unless the refiners make a reasonable demonstration that their absorption exceeded that percentage, and the DOE will hold an evidentiary hearing to permit the refiners to present evidence of their absorption. Accordingly, the validity of the refiners' assertion that they "provided the financing for the tertiary project" is an issue to be decided in the course of this proceeding, after briefs are received and a hearing convened.

In support of the position that the OHA has no authority to require an injury showing, the refiners cite *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (*Illinois Brick*) and *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (*Hanover*). In addition, they cite *Abbotts Dairies v. Butz*, 584 F.2d 12 (3d Cir. 1978); *Carter v. Berger*, 777 F.2d 1173 (7 Cir. 1985); and *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), which rely on the *Hanover* and *Illinois Brick* reasoning. These cases add nothing to the refiners' arguments. We have previously considered and rejected these very same arguments. We have also previously rejected the reasoning in *Illinois Brick* and *Hanover* as it applies to subpart v refund cases. *E.g., Office of Enforcement, Economic Regulatory Administration: In the Matter of Coline Gasoline Corporation*, 9 DOE ¶82,508 (1981); *Office of Enforcement,*

<sup>3</sup> The States submitting comments included: California, Connecticut, Idaho, Indiana, Michigan, Maryland, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin and Wyoming. The States also filed a reply to the comments of the refiners, the Unit and the Utilities. The reply generally offered support for our Proposed Order. We will not reiterate the States' position here in detail.

*Economic Regulatory Administration: In the Matter of Adams Resources, et al.*, 9 DOE ¶82,553 (1982).

We will not reiterate our complete response here. The cases cited by the refiners generally involve antitrust or tax considerations not present in the instant proceeding. We cannot find that these cases preclude the OHA from considering whether the refiners passed through the increased crude oil costs. Further, OHA's requirement of an injury showing in cases involving restitution has received judicial approval in *ARCO v. DOE*, 3 Fed. Energy Guidelines ¶26,546 (D. Del. 1985); see also *Behm*, 3 Fed. Energy Guidelines at 27,103. We find that the issue of OHA authority to require evidence of injury and cost absorption is now well-settled law.

The refiners also argue that the OHA has no authority under subpart V to disburse the escrowed funds. The refiners point out that this subpart provides for the disbursement of funds obtained through enforcement proceedings. According to the refiners, since the funds at issue were not obtained through an enforcement proceeding, we may not disburse them through the subpart V process.<sup>4</sup>

It is true that subpart V refers to funds received by the Agency through Remedial Orders, Consent Orders and other enforcement-type actions. However, the DOE is not basing its authority to make a final disposition of the escrowed funds on subpart V, as the refiners apparently believe. Rather, that authority rests upon the Agency's broad discretion under subpart D to create appropriate exception relief. The disbursement of the escrowed funds is simply part of that expansive power to create exception relief and terminate it in the most appropriate manner. *Exxon Corp v. DOE*, 802 F.2d 1400 (Temp. Emer. Ct. App. 1986); *Long Beach v. DOE*, 754 F.2d 379 (Temp. Emer. Ct. App. 1985) (*Long Beach*).

Having determined that the DOE has authority for disbursing the escrowed funds under its broad exceptions authority, we then needed to fashion an appropriate mechanism for that disbursement. We turned to subpart V for guidance in that regard. We fully recognized in our December 24 Proposed Order that subpart V was specifically designed for the disbursement of funds obtained through enforcement proceedings. 56 FR at 67311. However, the provisions of this subpart provide a clear, practical and expedient framework upon which to base the process for termination of the Citronelle exception relief. Moreover, we had experience in those proceedings in tracing the effect of overcharges whose effects on downstream were identical to the effects of the recertifications at issue here. We therefore decided to refer to those regulations in creating our disbursement plan. See *Long Beach*, 754 F.2d at 386, n.6.

The refiners also claim that if a refund proceeding is instituted, they should not be required to bear the burden of proving the level of injury that they sustained. In support of this position, the refiners state that

<sup>4</sup> A similar argument was raised by the Unit.



"they are not guilty of any wrongdoing." This argument misunderstands the nature of disbursement process. The fact that a claimant is responsible to provide evidence of injury is not based on "wrongdoing." No claimant in a refund proceeding is considered a "wrongdoer." Rather, we have competing interests in this proceeding, all advancing claims to the escrowed funds. In order to decide among those claimants, analysis of economic impact or injury is a fair and equitable means of formulating a disbursement plan. Moreover, it is hardly unfair to require that each claimant establish its own injury, when the claimant itself is in the best position to do so. We believe that the refiners, who have been on notice since the inception of the Citronelle exception relief that appropriate records should be maintained, are the parties best able to provide us with evidence of their own injury.

The refiners also object to the 5.4 percent absorption rate that we proposed to adopt in our Proposed Order. They believe that the 5.4 percent rate, which was taken from information received and conclusions reached in the Stripper Well proceeding, has no bearing in the present case. This issue should be postponed. The refiners' position regarding the correct measure of injury is more appropriately considered at the hearing which will be convened for this purpose. It is in this forum that the refiners may put forth arguments such as the rate at which they absorbed injury. At the hearing they may set forth support for their position that the crude oil marketplace at the time of decontrol did not display a normal relationship between crude oil prices and the selling price of refined petroleum products.

The refiners further urge that an independent decisionmaker should be appointed to adjudicate the refund issue. They contend that the OHA has prejudged the refund issue with respect to the refiners. This argument lacks an adequate foundation. We find no basis for giving any credence to the unsubstantiated assertions of the refiners concerning alleged prejudice. The record in this matter demonstrates our even-handed treatment of all parties concerned. In view of the considerable procedural safeguards which we have consistently provided throughout these Citronelle proceedings, including an opportunity for a full hearing, this Office has structured a reasonable process for arriving at a fair disposition.

The refiners also wish the OHA to clarify whether submission of representative evidence from several companies will be sufficient in connection with providing an injury level for the refiners as a group. Without reviewing the evidence in question, we cannot definitively respond to this request. However, in view of the nature of the arguments which we believe the refiners will present on the relationship between crude oil costs and market prices, we think that providing "representative" evidence is a reasonable approach to establishing an overall absorption rate. If we believe that individual evidence is required from each of the refiners, we will request it. Any refiner that expects to establish that its injury absorption pattern differed from the overall absorption rate will be expected to file a

separate brief showing the facts applicable to its particular operations.

The refiners also question our proposed reservation of 20 percent of the remaining Citronelle fund for the end-user claims process. They believe that since the Citronelle relief was announced on the eve of decontrol and their refiners' payments were not made until after decontrol, any passthrough of the cost of the Citronelle relief would not have affected products purchased during the controlled period.

As an initial matter, the issue of absorption of the effects of recertification is the specific issue upon which we plan to call a hearing. The amount made available for the end-user claims process will necessarily depend upon the absorption rate adopted for refiners. Thus, the issue raised by refiners is premature at this time.

To the extent that the refiners are arguing that end-users are not entitled to any refunds because the effects of the recertification were not passed through until after decontrol, we disagree. To the extent that the end-users bore some of that burden, even if it was experienced after decontrol, we believe that they were injured and are entitled to restitution.

The refiners also objected to the transfer of funds from the Citronelle bank escrow account to a United States Treasury escrow account. A request for a preliminary injunction to prevent that transfer was denied on February 12, 1992, by the United States District Court for the Southern District of Alabama. *R.H. Stechmann v. DOE*, No. 92-0054-LC-M. This transfer was perfectly appropriate, and, as we stated above, has in fact already been effected.

The refiners next claim that there was no basis for relieving the Unit of its repayment obligation. In *Citronelle*, we found that the Unit had received approximately \$20 million in exception relief benefits, and we relieved the Unit of a repayment obligation. The refiners suggest that the Unit might have actually received benefits of much more than \$20 million and that the parties should have an opportunity to be heard on this issue. The determination that the Unit should be relieved of a repayment obligation and the basis for that determination were set forth in *Citronelle*. Therefore, we find that this issue is not an appropriate one for consideration in this proceeding, which focuses on the correct disposition of the available *Citronelle* funds. The refiners may pursue this issue as part of any appropriate appeal of *Citronelle* that is available to them.

We will make an adjustment to the procedures in the Proposed Order regarding the claims filing period for refiners and other Entitlements Program participants. Our Proposed Order provided that briefs regarding the absorption issue, as well as refund applications by refiners and Entitlements Program participants, should be filed within 90 days after a final Decision and Order is published in the Federal Register. However, any refiner or Entitlements Program participant that does not wish to submit a brief on the absorption percentage, need not submit a refund application within that 90-day period. After the hearing is held, we intend to issue another Order setting forth

our findings on the absorption issue, and we will at that time announce a second filing date for refiner and Entitlements Program participant applications. Applications filed during the later period must accept the absorption percentage determined in the first phase. Any refiner or Entitlements Program participant that does not wish to automatically rely on the group absorption percentage established by OHA must file a brief in that regard and file a refund application concurrently with that brief in this first phase.

In sum, we now envision a two-phased application process for refiners and other Entitlements Program participants. In the earlier phase, applicants will submit briefs regarding the appropriate absorption percentage. These briefs may provide evidence either as to an appropriate group absorption rate or as to an appropriate individual absorption rate for a particular applicant. Any applicant that files an evidentiary brief must also submit its claim in this phase. In the earlier phase, we will accept claims from all refiner/Entitlements Program applicants, including: (a) Those that wish to rely on the absorption percentage, as well as those that do not; and (b) those that file briefs, as well as those that do not. In the later claims phase, we will accept claims only from refiner/entitlements program participants that have decided to rely on the absorption percentage that OHA arrives at after considering the evidence in phase one. No briefs on the absorption issue may be filed by these claimants.

One final matter with respect to refiner/Entitlements Program participant claims must be addressed at this point. This concerns the share of the total fund allocated to refiners that will be allocated to each refiner claimant. In the Proposed Order we stated that each refiner's proportionate share of the fund would be the same as its proportionate share of the Stripper Well Refiners escrow fund. We believe it is more appropriate to measure each refiner claimant's share using its percentage of runs to stills on the Entitlements List for November 1980. 46 FR 10195 (February 2, 1981). For example, if a particular refiner had 10 percent of the runs to stills in that month, it would be allocated 10 percent of the funds in the Citronelle escrow account allocated to refiners. We will take comments on the correct formula for allocating the funds among refiners, and reach a final determination in our Order considering the absorption issue. These comments must be filed within 90 days of the date of publication of this final Decision and Order in the Federal Register.

#### B. The Utilities Group

The comments filed by the Utilities group generally support our position with respect to disbursement of the escrow funds to the refiners. However, the Utilities believe that refiners are estopped from arguing that their absorption rate was greater than the 2.7 percent to 8.1 percent range that we found in connection with the Stripper Well hearing. They also believe that we should not consider arguments that the fact that the recertifications took place at the end of the



controlled period may have caused a higher absorption rate than the range we found in the Stripper Well Report. In this regard, the Utilities set forth detailed legal and economic arguments in support of their position concerning the refiners' absorption rate.

We are inclined to consider arguments that the Citronelle recertifications took place at the end of the control period and thus may well have had a very different absorption effect from crude oil price increases that occurred throughout the 1973 through 1981 period of controls. Therefore we encourage the refiners to fully brief this issue. However, any estoppel issues or economic arguments that the Utilities wish to present may be raised in their reply briefs or at the hearing regarding the refiners' absorption rate. We find that they are not properly considered in connection with finalization of the Proposed Order.

The Utilities also argue that end users should not be limited to a refund pool of 20 percent of the amount available after the subtraction of the refiners' sum. The method of allocating funds to end-users will be discussed below.

### C. The Cooperatives

In their comments, the Cooperatives generally support the Proposed Decision and Order. They also point out that under the Stripper Well Settlement Agreement, certain national, regional and interregional cooperatives received refunds from an escrow fund established especially for their benefit. In order to receive that disbursement, these large cooperatives were required to sign a waiver releasing their rights to any subpart V refunds deriving from "alleged crude oil violations." The Cooperatives argue that since the Citronelle funds at issue here are not derived from any violation, these national and regional coops did not waive their rights to receive the Citronelle monies.

The Cooperatives are correct. As we stated above, this is not a proceeding involving disbursement of monies involving actual or alleged violations of DOE regulations. The waivers signed by the Cooperatives covered their rights to apply for refunds involving "alleged crude oil violations." Cooperative Waiver, Release and Other Conditions of Disbursement, Paragraphs 5(a)(ii), 8; Settlement Agreement at 137. Accordingly, these national and inter-regional cooperatives are not barred from receiving Citronelle refund by virtue of having signed a stripper well waiver.

In this regard, we reviewed the releases signed by other waiving groups. The release signed by airlines regarding waiver of rights to apply for other refunds was virtually identical to that of the cooperatives. It affected only their rights to apply for refunds relating to violations or alleged violations of federal mandatory allocation and price regulations applicable to crude oil and the Entitlements Program. Airlines Waiver, Paragraphs 7(a) (2), 10; Settlement Agreement at 100. Thus, the airlines waivers does not preclude them from filing a Citronelle refund application.

However, waivers signed by other entities appear to be somewhat broader. They cover funds involved in administrative proceedings

"relating to the federal mandatory allocation and price regulations applicable to crude oil, and the entitlements program (herein Alleged Crude Oil Violations)." *E.g.*, Surface Transporters' Waiver Paragraph 7(a)(2); Settlement Agreement at 150; Utilities Waiver and Release Paragraph 7(a)(2); Settlement Agreement at 160. We believe that this language is broad enough to preclude a signatory from receiving a Citronelle refund. Therefore, entities that signed such a waiver will be expected to explain why they are not precluded from receiving a Citronelle refund in order to be eligible in this proceeding.

### D. The States

In their submission, the States generally support the Proposed Order. However, they state that if we determine that the refiners' absorption rate is greater than 5.4 percent, then the States' 40 percent share should be computed prior to the deduction of the refiners' share. They base this assertion on language in the Stripper Well Settlement Agreement stating that:

"\* \* \* nothing contained in the exclusions contained in paragraphs \* \* \* (F) (relating to the Citronelle Unit's exception relief) \* \* \* shall allow a claim in respect to or in any other way affect the funds distributed or distributable to the States."

*Final Settlement Agreement* at 29. The States contend that this language is analogous to other provisions of the Stripper Well Settlement Agreement which have been interpreted by the Temporary Emergency Court of Appeals as precluding the reduction of the States' share when crude oil funds are used to pay entitlements exception relief to refiners. *In Re: Department of Energy Stripper Well Exemption Litigation*, 855 F.2d 865 (Temp. Emer. Ct. App. 1988).

We disagree with the States' assumption that the Settlement Agreement governs the disbursement of the Citronelle funds. The Settlement Agreement specifically provided a disbursement mechanism for funds escrowed as a result of the DOE's Stripper Well Exemption Litigation and funds involving "alleged violations of DOE's price and allocation controls applicable to crude oil." Settlement Agreement at 1. The Agreement did not cover how Citronelle funds would be disbursed. Accordingly, we are not bound by the MSRP, or by subpart V, as the States appear to believe. While we will generally look to the subpart V regulations for guidance, we will not necessarily rely on the MSRP. We believe that we have broad discretion to fashion a fair distribution plan for these funds. Accordingly, we will decide upon an appropriate share for the States after the funding plans for direct restitution have been decided. Before making that determination, we will notify interested parties of our preliminary determination and provide for a sixty-day comment period.

The State further maintain that the refiners have had ample opportunity in previous proceedings to state their positions regarding absorption, and that no further filings on this issue are necessary. We disagree. The Citronelle recertification may well be different from other miscertification effects studied, and we believe that the refiners should have the opportunity to present evidence regarding this matter.

The States next assert that the injury range that we found in the Stripper Well hearing, the 5.4 percent average referred to above, already includes the injury experienced by the refiners as a result of the Citronelle recertification. The States therefore maintain that there is no need to give further consideration to the injury level. We do not concur. In view of the fact that we have a discrete sum of money available which emanates solely from the Citronelle recertification, we are obligated to look into all relevant facts surrounding the absorption incidence with respect to that event. The average absorption incidence that we found over the entire regulated period in connection with the Stripper Well hearing may not provide us with the best explanation of that particular event.

The States finally contend that the 30-day period that we tentatively provided for reply to the refiners' briefs is insufficient. They request a 90-day response period if there are more than two refiner submissions. We will hold in abeyance the States' request. Once all the refiner briefs and evidence have been filed, the States may file a request for an extension of time to submit replies if they believe additional time is necessary.

### E. The Unit

The Unit believes that at least \$95 million of the funds in the Citronelle account belongs to it and objects to the OHA's proposal to conduct a refund proceeding. The Unit's objection is misplaced. The determination as to the amount the Unit May receive was made in *Citronelle*. That Decision provided that to the extent that the Unit Believed it received less than \$20 million in entitlements benefits, it could file a Motion for Reconsideration.

56 FR 67315, Note 6. However, to the extent that the Unit believes that it is entitled to a larger portion of the escrow fund, the argument must be made in the context of an appeal of that Order to the Federal Energy Regulatory Commission (FERC). 10 CFR 205.69(b). In fact, the Unit has filed such an appeal (FERC Case No. RA92-1). There is no basis for further consideration of this issue in the instant proceeding.

### III. Division of the Citronelle Fund

We must also consider the appropriate division of the Citronelle funds among the interested parties. At present, we believe that the entities who should be considered for a share of the Citronelle funds include: Refiners; end-users that received a Stripper Well refund, but did not waive their rights to a Citronelle refund; end-users that did not apply for a Stripper Well refund; the States and the federal government.

We will consider the refiners' share first. That share will depend on the absorption rate that will be determined after evaluating briefs and convening a hearing. Each refiner's individual share of that fund will be computed either on the basis of its percentage share of the stripper well refiners' escrow fund or based on its percentage of runs to stills on the November 1980 Entitlements List. We will make the latter determination based on the comments received on this issue.



Refunds available for end-user applicants that received Stripper Well refunds, as well as for other end-user applicants, will be computed on a volumetric basis. That is, we will divide the Citronelle escrow fund (currently \$123,187,431) less the amount allocated to refiners by the total consumption of petroleum products in the United States during the price control period (2,020,997,335,000 gallons).<sup>5</sup> For example, if we determined that the refiners as a group were entitled to a refund of \$12 million, we would deduct that sum from the Citronelle fund in arriving at a volumetric amount [ $(\$123,187,431 - \$12,000,000 = \$111,187,431) / 2,020,997,335,000 = \$0.000055$ ]. The volumetric refund amount is thus \$0.000055 per gallon. Therefore, an eligible firm that purchased 100,000,000 gallons of product during the covered period would have an allocable share of \$5,500. In accordance with OHA precedents, end-users would be presumed injured and therefore be eligible to receive their full volumetric shares. Resellers and retailers would be required to show injury. That showing has been very difficult in the subpart V crude oil refund proceeding and we believe it would equally difficult in the context of the Citronelle proceeding. See, e.g., *Schuchart Petroleum Co.*, 20 DOE ¶ 85,162 (1990). We therefore discourage retailers and resellers from applying for a Citronelle refund.

Still assuming a \$12 million refund pool for the refiners, and the \$0.000055 volumetric amount calculated above, the pool available for eligible stripper well participants would be \$0.000055 multiplied by the total volume of petroleum products that they purchased during the controlled period. Similarly, the money available for other end-users would be the volumetric amount multiplied by the total gallonage applied for in the subpart V crude oil refund proceeding as of June 30, 1994 that is ultimately approved. Once we know for certain the exact sum available for other end-users, it will be placed into a separate crude oil overcharge subaccount within the DOE's petroleum overcharge escrow account at the Department of the Treasury. Other end-users of refined petroleum products will effectively receive Citronelle restitution through the normal crude oil overcharge refund process. That is, they will receive the amount that they would have otherwise been granted in the crude oil overcharge refund proceeding, plus an appropriate portion of the Citronelle fund.

After the refund amounts available for direct restitution to the above groups are determined, we will decide on an appropriate disbursement process for the remaining funds, bearing in mind that the likely recipients are the States and the federal government.

#### IV. Refund Applications

As we indicated in the Proposed Order, the refund application for Citronelle funds will be streamlined. However, there is some additional information not referred to in the Proposed Order which we now find

necessary. The following procedural information should be included in all Citronelle refund claims:

- (a) Name and address of applicant;
- (b) Statement that the applicant is authorized to file the claim and that the information provided is true and correct to the best of the applicant's knowledge;
- (c) Signature of the applicant or an authorization of representation;
- (d) Social security number or tax identification number of applicant;
- (e) Statement that the applicant has not filed another crude oil refund claim or elsewhere waived a right to receive a Citronelle refund. If the applicant received a refund from a Stripper Well escrow fund, it must so indicate;
- (f) All applications must be typed or printed, and clearly labeled Application for Citronelle Refund.

End-user claimants that signed a waiver in the Stripper Well proceeding should mark their submission RF344. These refund applications must be filed by June 30, 1993. Refiners and other Entitlements Program participants should mark their submissions RF345. All others should mark their applications RF272. Firms in this last category that have already filed a crude oil refund claim in the subpart V crude oil overcharge refund proceeding need not file another refund application in order to receive a portion of the Citronelle funds.

If the application contains no confidential information, the applicant must submit an original and one copy of the application. If the application contains confidential information, the applicant must submit an original application and two copies from which the confidential information has been deleted. Applications must be submitted on a separate sheet of paper from any briefs, comments or evidentiary material submitted. They should be sent to Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

#### It is Therefore ordered That:

(1) The Proposed Decision and Order issued on December 24, 1991, in *The 341 Tract Unit of the Citronelle Field*, Case No. LFX-0006, is issued as a final Decision and Order, with the modifications set forth below.

(2) The escrow funds received as a result of the termination of exception relief granted to the 341 Tract Unit of the Citronelle Field, and now deposited in an escrow account at the United States Department of the Treasury will be distributed in accordance with the foregoing Decision.

(3) Within 90 days of the date of publication of this final Decision and Order in the *Federal Register*, refiners and other participants in the DOE Entitlements Program may submit briefs and economic evidence on the issue of their absorption rate, as well as briefs on the appropriate manner of allocating the Entitlements Program participants' share of the Citronelle fund among Entitlements Program participants. The briefs and evidence should be mailed to: Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, and should refer to Case No. LFX-0006.

(4) Refiners and other Entitlements Program participants that submit briefs and evidence pursuant to Paragraph (3) above, shall at the same time submit applications for refund from the Citronelle escrow fund. These applications should be marked RF345.

(5) Refiners and other Entitlements Program participants that do not submit briefs pursuant to Paragraph (3) may submit applications for refund from the Citronelle escrow fund within 90 days of the date of publication of this Decision and Order in the *Federal Register*. These applicants may delay filing until a final deadline is established by the OHA. Upon issuance of an Order by OHA setting forth conclusions regarding the refiner absorption issue, a second claims filing period will be established for refiners and Entitlements Program participants that did not file evidentiary briefs in this proceeding. Applications filed pursuant to this paragraph should be marked RF345.

(6) Within 30 days of the date that the briefs and evidence referred to in Paragraph (3) above are due, interested parties may submit responses to those filings.

(7) An evidentiary hearing regarding the refiner absorption issue will be convened approximately 45 days after the date referred to in Paragraph (6) above.

(8) Firms that signed Stripper Well waivers shall file Citronelle refund applications by June 30, 1993. These applications should be marked RF344.

Dated: April 3, 1992.

Thomas L. Wicker

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 92-8332 Filed 4-9-92; 8:45 am]

BILLING CODE 6450-01-M

## ENVIRONMENTAL PROTECTION AGENCY

[FRL 4122-1]

### Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

**DATES:** Comments must be submitted on or before May 11, 1992. For further information, or to obtain a copy of this ICR, contact Sandy Farmer at EPA (202) 260-2740.

<sup>5</sup> The numerator would be decreased by any monies paid to Citronelle as a result of its appeal or Motion for Reconsideration.



**SUPPLEMENTARY INFORMATION:****Office of Pesticides and Toxic Substances**

*Title:* Application and Summary Report for an Emergency Exemption for Pesticides. (EPA ICR No.: 0596.04; OMB No.: 2070-0032). This is a request to extend the expiration date of a presently approved collection.

*Abstract:* Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act, the EPA may temporarily authorize states, territories, and federal agencies to ship and use unregistered pesticides in emergency situations. To ensure that an emergency actually exists, and that use of the pesticide will not pose an unreasonable risk to human health or the environment, the EPA requires exemption applicants to explain the circumstances necessitating the emergency use and to provide details on the pesticide and its proposed application. Following the application of the pesticide, applicants must submit a report to the EPA describing the pesticide treatment, and its effectiveness as well as any adverse effects.

*Burden Statement:* The public burden for this collection of information is estimated to average 101 hours per response for reporting and 2 hours per recordkeeper annually. This estimate includes the initial request for an emergency exemption and the time needed to complete and submit the summary report after the pesticide application. Included in this estimate is also the time needed to review instructions, search existing data sources, gather and maintain data needed, and review the collection of information.

*Respondents:* States, territories and federal agencies.

*Estimated No. of Respondents:* 60.

*Estimated No. of Responses per Respondents:* 5.

*Estimated Total Annual Burden on Respondents:* 30,900 hours.

*Frequency of Collection:* On occasion.

Send comments regarding the burden estimate, or any other aspect of the collection of information, including suggestion for reducing the burden to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street, SW., Washington, DC 20460, and

Matthew Mitchell, Office of Management and Budget, Paperwork Reduction Project (2070-0032), Office of Information and Regulatory Affairs,

725 17th Street, NW., Washington, DC 20503.

April 3, 1992.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 92-8313 Filed 4-9-92; 8:45 am]

BILLING CODE 5560-50-M

**Agency Information Collection Activities Under OMB Review**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.

**DATES:** Comments must be submitted on or before May 11, 1992. For further information or to obtain a copy of this ICR contact Sandy Farmer at EPA, (202) 260-2740.

**SUPPLEMENTARY INFORMATION:****Office of Air and Radiation**

*Title:* Reporting and Recordkeeping Requirements for the New Source Performance Standards (NSPS) for Rubber Tire Manufacturing Industry (ICR No. 1158.04; OMB No. 2060-0156).

*Abstract:* This ICR is for an extension of an existing information collection in support of the Clean Air Act, as described under the general NSPS at 40 CFR part 60.7-60.8 and the specific NSPS, for volatile organic compound (VOC) emissions from the rubber tire manufacturing industry, at 40 CFR part 60.540-60.548. The information will be used by the EPA to direct monitoring, inspection, and enforcement efforts, thereby ensuring compliance with the NSPS.

Owners and operators of affected facilities must provide EPA with: (1) Notification of construction, reconstruction, or modification; (2) anticipated and actual dates of facility startup; (3) initial and, where appropriate, monthly performance test data and results; and (4) a semiannual report of any monitored operating parameter or emission rate that falls outside a specified limit. Where appropriate, certain owners and operators must also submit annual reports that provide information on the VOC content of water-based sprays.

All affected facilities must maintain records on the facility operation that

document: (1) The occurrence and duration of any start-ups, shutdowns, and malfunctions; (2) VOC use and emission reduction system operating data; (3) monthly performance test results. Presently there are 13 facilities subject to the regulation with an estimated growth of 4.4 facilities per year over the next three years. All subject facilities must maintain records related to compliance for two years.

*Burden Statement:* Public reporting burden for facilities subject to this collection of information is estimated to average 38.5 hours per response including time for reviewing instructions, searching existing data sources, gathering and maintaining data, and completing and reviewing the collection of information. Public recordkeeping burden is estimated to average 314 hours annually.

*Respondents:* Owners or operators of subject rubber tire manufacturing facilities which commenced construction, reconstruction, or modification after January 20, 1983.

*Estimated Number of Respondents:* 20.

*Estimated Number of Responses per Respondent:* 2.

*Estimated Total Annual Burden on Respondents:* 7,742 hours.

*Frequency of Collection:* One-time notifications for new facilities; annual and semiannual reporting, as appropriate, for subject facilities.

Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street, SW., Washington, DC 20460, and,

Troy Hillier, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, DC 20503.

Dated: April 3, 1992.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 92-8314 Filed 4-9-92; 8:45 am]

BILLING CODE 5560-50-M

[FRL-4121-8]

**Renewal of the Policy Dialogue Committee on Mining Wastes**

**AGENCY:** Environmental Protection Agency.



**ACTION:** Renewal of Federal Advisor Committee—Police Dialogue Committee on Mining Wastes.

**SUMMARY:** As required by section 9(a)(2) of the Federal Advisor Committee Act (Pub. L. 92-483), we are giving notice of the renewal of the Mining Waste Policy Dialogue Committee. The Committee was formed in March, 1991 to provide a forum to refine and further develop issues related to managing mining waste and to facilitate the exchange of ideas and information among the interested parties. The Charter has been renewed through March 30, 1992. We have determined that renewal of this Committee is in the public interest and will assist the Agency in performing its duties prescribed in the Resource Conservation Recovery Act.

Copies of the Committee Charter have been filed with the appropriate committees of Congress and the Library of Congress.

No date has been set for the next meeting of the Policy Dialogue Committee. Notice will be published when the date and location of the next meeting is known.

**FOR FURTHER INFORMATION CONTACT:**

Persons needing further information on substantive aspects of the mining waste program should call Steve Hoffman, Office of Solid Waste, U.S. EPA, (703) 308-8413. Summaries of previous meetings will be made available upon written request to Patricia Whiting, Office of Solid Waste, (OS-323W), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Persons needing further information on administrative matters such as committee arrangements or procedures should contact Deborah Dalton, EPA Consensus and Dispute Resolution Program, (202) 382-5495 or the Committee's facilitator, John Ehrman, The Keystone Center, (303) 468-5822.

Dated: April 2, 1992.

Deborah Dalton,

Designated Federal Official, Deputy Director, Consensus and Dispute Resolution Program, Office of Policy, Planning and Evaluation.

[FR Doc. 92-8312 Filed 4-9-92; 8:45 am]

BILLING CODE 6580-50-M

27, 1992 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 260-5076.

**Summary of Rating Definitions**

**Environmental Impact of the Action**

*LO—Lack of Objections*

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

*EC—Environmental Concerns*

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

*EO—Environmental Objections*

The EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

*EU—Environmentally Unsatisfactory*

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the CEQ.

**Adequacy of the Impact Statement**

*Category 1—Adequate*

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the

reviewer may suggest the addition of clarifying language or information.

*Category 2—Insufficient Information*

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

*Category 3—Inadequate*

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

**Draft EISs**

ERP No. D-AFS-K65134-CA Rating EO2, South Fork of the Trinity Wild and Scenic River Management Plan, National Wild and Scenic Rivers, Implementation, Trinity River, Six Rivers and Shasta-Trinity National Forests, Trinity and Humboldt Counties, CA.

**Summary**

EPA expressed environmental objections to the Forest Service's preferred alternative because selection of that alternative may not offer an adequate level of watershed protection, particularly given the past land management practices and natural disasters that contribute to high levels of erosion and stream sedimentation. Cumulative impacts from private and federal land-based activities may continue to create adverse impacts on the river and its resources. EPA

[ER-FRL-4121-6]

**Environmental Impact Statements and Regulations; Availability of EPA Comments**

Availability of EPA comments prepared March 23, 1992 Through March



recommended expanding the wild and scenic river corridor beyond that defined in the preferred alternative.

ERP No. D-AFS-K65135-CA Rating EC2, North Fork Kern/South Fork Kern Wild and Scenic Rivers Management Plan, Implementation, Sequoia and Inyo National Forests, Tulare and Kern Counties, CA.

#### Summary

EPA expressed environmental concerns regarding potential impacts to the water quality of the wild and scenic river. EPA required additional information in the final EIS on water quality monitoring and grazing management practices.

ERP No. D-BLM-J67013-WY Rating EC2, West Rocky Butte (WRB) Tract Coal Lease Application (WYW122586) combined with the existing Rocky Butte Tract (WYW78633) Logical Mining Unit (LMU) Mine Leasing and Land Acquisition, Powder River Basin, Campbell County, WY.

#### Summary

EPA had environmental concerns with the proposed project, specifically concerning the preservation of groundwater quality. The final EIS should include supplementary groundwater resource information in order to fully assess environmental impacts that should be avoided.

ERP No. D-COE-D36110-PA Rating LO, Curwenville Lake Water Storage Reallocation, Implementation, Susquehanna River Basin, Susquehanna River, Clearfield County, PA.

#### Summary

EPA's review did not identify any potential environmental impacts requiring changes to the proposed action.

ERP No. D-COE-K36105-CA Rating EC2, San Rafael Canal Flood Control/Marin County Shoreline Study, Implementation, City of San Rafael, Marin County, CA.

#### Summary

EPA expressed environmental concerns regarding potential impacts to wetlands, water quality, wildlife and threatened and endangered species. EPA requested that the Corps document the project's compliance with water quality standards and consultation with the U.S. Fish and Wildlife Service on threatened and endangered species and their critical habitat.

ERP No. D-COE-K39046-AK Rating EC2, Southeast Alaska Harbors Improvement, Construction of Offshore

Breakwaters in Sitka Channel for Protection and Expansion of Thomsen Harbors, Funding, AK.

#### Summary

EPA's primary concerns are in the areas of indirect and cumulative effects of increased growth in the Thomsen Harbor, the proposed parking facilities should be reduced in size so that the filling of valuable habitat can be avoided and discussion of monitoring and mitigation should be expanded and clarified.

ERP No. D-FHW-J40124-UT Rating EC2, Utah Forest Highway 5 and Wolf Creek Road, UT-35 Improvement, North Fork Provo River Bridge to Stockmore, Funding and section 404 Permit, Duchesne, Wasatch and Summit Counties, UT.

#### Summary

EPA expressed concern for the impacted wetlands and would like to see the final EIS better address the cumulative impacts of all projects in the vicinity.

#### Final EISs

ERP No. F-COE-D32033-PA Lower Monongahela River Navigation System, Locks and Dam Nos. 2, 3, and 4 Improvements, Funding, Allegheny, Washington, and Westmoreland Counties, PA.

#### Summary

EPA still has some concerns with the proposed mitigation plan which is not in final form. EPA recommends that valley fills, wetland and forested sites be avoided as disposal site options, and instead consideration be given to abandoned strip mines and disturbed agricultural areas. Finally, we encourage the Corps to develop mitigation planning whenever appropriate as the project unfolds.

ERP No. F-SFW-L70011-AK Federal Subsistence Management Program for Federal Public Lands in Alaska, Implementation, AK.

#### Summary

EPA has no objections to the preferred alternative as described in the final EIS.

Dated: April 7, 1992.

Marshall Cain,

Senior Legal Advisor, Office of Federal Activities.

[FR Doc. 92-8310 Filed 4-9-92; 8:45 am]

BILLING CODE 5580-50-M

[ER-FRL-4121-5]

#### Environmental Impact Statements; Availability

*Responsible Agency:* Office of Federal Activities, General Information (202) 260-5076 or (202) 260-5075. Availability of Environmental Impact Statements Filed March 30, 1992 Through April 03, 1992 Pursuant to 40 CFR 1506.9.

EIS No. 920110, Final EIS, COE, GA, Chattahoochee River National Recreation Area Sand Gravel Dredging, section 404 Permit Issuance, Chattahoochee River, Gwinnett County, GA, Due: May 11, 1992, Contact: Bradley A. Foster (912) 652-5833.

EIS No. 920111, Draft EIS, FAA, MI, Detroit Metropolitan Wayne County Airport, Air Traffic Control Noise Abatement Procedures, Permanent Implementation and Completion of the Master Plan Development, Wayne County, MI, Due: May 26, 1992, Contact: Douglas Powers (312) 694-7899.

EIS No. 920112, Draft EIS, FAA, UT, Salt Lake City International Airport Expansion, Construction and Operation, Air Carrier Runway 16R/34L, Plan Approval, Funding and section 404 Permit Issuance, Salt Lake City, Salt Lake County, UT, Due: May 27, 1992, Contact: Barbara Johnson (303) 286-5540.

EIS No. 920113, Draft EIS, AFS, WA, Breezin Timber Sales Management Plan, Implementation, Olympic National Forest, Quilcene Ranger District, Clallam and Jefferson Counties, WA, Due: May 26, 1992, Contact: Jim Halvorson (206) 765-3386.

EIS No. 920114, Draft EIS, FHW, AZ, AZ-87/Beeline Highway Upgrading, Saguaro Lake Road to near the Maricopa-Gila County Line, Funding, Land Exchange with the Forest Service and COE Section 404 Permit Issuance, Maricopa County, AZ, Due: June 01, 1992, Contact: Ken Davis (602) 379-3646.

EIS No. 920115, Draft EIS, MMS, AL, LA, MS, TX 1993 Central and Western Gulf of Mexico Outer Continental Shelf (OSC) Oil and Gas Lease Sales No. 142 and No. 143, Lease Offerings, offshore AL, LA, TX and MS, Due: May 26, 1992, Contact: Richard H. Miller (703) 787-1665.

EIS No. 920116, Draft EIS, COE, CA, Gaviota Marine Terminal (GTC) Project, Oil and Gas Production Facilities Consolidation, Section 404 Permit Issuance, Santa Barbara County, CA, Due: May 26, 1992, Contact: Ron Ganzfried (213) 894-2314.



Dated: April 7, 1992

Marshall Cain,

Senior Legal Advisor, Office of Federal Activities.

[FR Doc. 92-8309 Filed 4-9-92; 8:45 am]

BILLING CODE 6560-50-M

## FEDERAL COMMUNICATIONS COMMISSION

### Public Information Collection Requirement Submitted to Office of Management and Budget for Review

April 8, 1992.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, NW., Washington, DC 20036, (202) 452-1422. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 632-7513. Persons wishing to comment on this information collection should contact Jonas Neihardt, Office of Management and Budget, room 3235 NEOB, Washington, DC 20503, (202) 395-4814.

OMB Number: 3060-0431.

Title: Section 22.609 (e), Disclosure of Frequency Coordination Information Upon Request.

Action: Extension of a currently approved collection.

Respondents: Businesses or other for-profit (including small businesses).

Frequency of Response: On occasion reporting.

Estimated Annual Burden: 30 responses; 1 hour average burden per response; 30 hours total annual burden.

Needs and Uses: Section 22.609(e) of the Rules requires that Rural Radio Service (RRS) licensees provide necessary frequency coordination information to prospective applicants who proposed systems may affect or be affected by the existing RRS licensee. The circumstances that make collection of this information necessary are that RRS licensees have not, in the past, been required to provide the type of information about their systems that is necessary for others to determine the systems' propagation of radio waves. The information was not required because the licensees in the RRS were required to go off the air if anyone in the Public Land Mobile Radio Service (PLMRS) wanted to use the frequency on or near the RRS licensee's location.

Since a PLMRS licensee was not required to protect the RRS licensee's service area from interference, engineering information about the RRS licensee's service area was not important. Now, however, as the result of rulemaking in CC Docket No. 86-496, released 6/21/89, the Commission decided that RRS licensees should be able to keep their stations even if some other party wants to use the frequency. Therefore, the existing station's engineering information is important because if another station is to operate in the vicinity of a RRS licensee, it must plan its engineering so that it does not cause radio interference to the existing licensee. So, the information required is to the benefit of the RRS licensee's customers and to the public who will be served by the proposed new station.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-8342 Filed 4-9-92; 8:45 am]

BILLING CODE 6712-01-M

### Network Reliability Council Meeting

April 9, 1992.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, this notice advises interested persons of the second meeting of the Network Reliability Council ("Council"), which will be held at the Federal Communications Commission in Washington, DC.

**DATES:** Wednesday, April 29, 1992 at 2 p.m.

**ADDRESSES:** Federal Communications Commission, Room 856, 1919 M Street, NW., Washington, DC 20554.

**SUPPLEMENTARY INFORMATION:** The Council was established by the Federal Communications Commission to bring together leaders of the telecommunications industry and telecommunications experts from academic and consumer organizations to explore and recommend measures that would enhance network reliability.

The agenda for the second meeting is as follows. The meeting will begin with introductory comments by Chairman Henson. Chairman Henson will report on the status of the informal working groups so far established. Ross Ireland and George Barletta, members of two of these groups, may add their comments. The Threshold Reporting Group will make its recommendation to the Council, after which the Council will

discuss the recommendation and decide whether or not to adopt it. The Council may then address other issues, including those presented in Commissioner Duggan's letter of February 27. After determining the next meeting date, the Council will adjourn.

Members of the general public may attend the meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. There will be no public oral participation, but the public may submit written comments to James Keegan, the Council's designated Federal Officer, before the meeting.

For additional information, contact James Keegan, designated Federal Officer of the Network Reliability Council and Chief, Domestic Facilities Division, Federal Communications Commission at (202) 634-1860.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

[FR Doc. 92-8446 Filed 4-9-92; 8:45 am]

BILLING CODE 6712-01-M

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Coastal Barrier Improvement Act; Property Availability: Lakeway Resort, Austin, TX

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the property known as the "Lakeway Resort" located near Austin, Texas is affected by section 10 of the Coastal Barrier Improvement Act of 1990, as specified below.

**DATES:** Written Notices of Serious Interest to purchase or effect other transfer of the property may be mailed or faxed to the Federal Deposit Insurance Corporation until July 9, 1992.

**ADDRESSES:** Copies of detailed descriptions of the property can be obtained by contacting the following Person: Ken Frankenfeld, AMRESO Management, Inc., 301 Congress Avenue, 2nd Floor, Austin, Texas 78701, telephone (512) 397-2027, Fax (512) 397-2833.

**SUPPLEMENTARY INFORMATION:** Lakeway is a planned development community located in the Texas hill country approximately 25 minutes northwest of Austin.



The undeveloped property, to be conveyed in bulk sale only, includes the following:

1. Lakeway West—approximately 1,276 acres of undeveloped land, bordered on the east by Rough Hollow and on the southwest by State Highway 71.

2. Rough Hollow—approximately 261 acres of land platted with 110 undeveloped single family lots on approximately 231 acres of the tract.

3. Section 19—approximately 45 acres of land located next to the World of Tennis Center, not currently zoned.

Written notice of serious interest to purchase the property must be received on or before July 9, 1992, by Ken Frankenfeld at the above address.

Those entities eligible to submit written notices of serious interest are:

1. Agencies or entities of the Federal government;
2. Agencies or entities of State or local government; and
3. "Qualified organizations" pursuant to section 170(h) of the Internal Revenue Code of 1986 (26 U.S.C. 170(h)(s)).

#### Form of Notice

Notices of serious interest should be in the following form:

Notice of Serious Interest re:  
Lakeway Resort, Austin, Texas.

1. Name of eligible entity.
2. Declaration of eligibility to submit notice under criteria set forth in Public Law 101-591, section 10(b)(2).
3. Brief description of proposed terms of purchase or other offer (e.g. price and method of financing).
4. Declaration by entity that it intends to use the property primarily for wildlife refuge, sanctuary, open space, recreational, historical, cultural or natural resource conservation purposes.

Dated: April 3, 1992.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 92-8278 Filed 4-9-92; 8:45 am]

BILLING CODE 6714-01-M

#### FEDERAL MARITIME COMMISSION

##### Port of Oakland, et al.; Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may

submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200290-003.

Title: Port of Oakland/Italia di Navigazione/d'Amico Terminal Agreement.

#### Parties:

City of Oakland  
Italia S.p.A. di Navigazione  
d'Amico Societa di Navigazione per Azioni ("d'Amico")

Synopsis: The amendment deletes d'Amico as a party to the Agreement and changes the name of the Agreement to reflect d'Amico's departure.

Agreement No.: 224-200641.

Title: Port of Oakland/d'Amico Line Terminal Agreement.

#### Parties:

Port of Oakland  
d'Amico Societa di Navigazione per Azioni ("d'Amico")

Synopsis: The subject Agreement provides for the use by d'Amico of assigned portions of the Charles P. Howard Terminal and other facilities at the Port of Oakland through September 30, 1994.

Agreement No.: 224-200642.

Title: Stevedoring Services of America and The Port of Portland Lease Agreement.

#### Parties:

Stevedoring Services of America  
Port of Portland

Synopsis: The Agreement provides for the Port of Portland to lease to Stevedoring Services of America approximately 3 acres of yard space at Terminal 1. The term of the Agreement is for 1 year.

Agreement No.: 232-011372.

Title: TMM/EAC Space Charter and Sailing Agreement.

#### Parties:

Transportation Maritima Mexicana, S.A. de C.V. ("TMM")  
EAC Lines Trans Pacific Service, Ltd. ("EAC")

Synopsis: The proposed Agreement would permit the parties to charter space to one another and to rationalize their respective services in the trade between the United States West Coast ports and inland points via such ports, and ports and inland points in the Far

East, as well as other Pacific Basin ports and points via transshipment. TMM would operate a maximum of 8 vessels and EAC would operate a maximum of 2, each vessel with a maximum capacity of 3,000 TEU's. The parties have requested a shortened review period.

Dated: April 7, 1992.

By Order of the Federal Maritime Commission.

Joseph C. Polking,  
Secretary.

[FR Doc. 92-8300 Filed 4-9-92; 8:45 am]

BILLING CODE 6730-01-M

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Administration for Children and Families

##### Agency Information Collection Under OMB Review

AGENCY: Administration for Children and Families, Administration on Developmental Disabilities, HHS.

ACTION: Notice.

Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), we have submitted to the Office of Management and Budget (OMB) a request for renewal of an existing information collection, "State Plan for Federal Assistance for Planning Priority Area Activities for Persons with Developmental Disabilities: Basic State Grant." This program is administered by the Department of Health and Human Services, Administration for Children and Families, Administration on Developmental Disabilities (ADD).

ADDRESSES: Copies of the Information Collection request may be obtained from Steve Smith, Reports Clearance Officer, by calling (202) 401-9235. Written comments and questions regarding the requested approval for information collection should be sent directly to: Kristina Emanuels, OMB Desk Officer for ACF, OMB Reports Management Branch, New Executive Office Building, room 3002, 725 17th Street, NW., Washington, DC 20503, (202) 395-7316.

##### Information on Document

Title: State Plan for Federal Assistance for Planning Priority Area Activities for Persons with Developmental Disabilities: Basic State Grant Program.

OMB No.: 0980-0162.

Description: The Developmental Disabilities' Basic State Grant Program was established in 1970 under the Developmental Disabilities Services and



Facilities Construction Amendments of 1970 to provide planning and services for persons with developmental disabilities. As required by statute, State Developmental Disabilities Planning Councils are required to develop their State plans. The Developmental Disabilities State Plan provides information on persons with developmental disabilities within a particular State and a description of the service needs of persons with developmental disabilities. The plan sets forth the goals and specific objectives to be achieved by the State in meeting the service needs of this population. It describes state priorities, strategies and actions, and the allocation of funds to meet these goals and objectives.

*Annual Number of Respondents:* 55.

*Annual Frequency:* 1.

*Average Burden Hours Per Response:* 100.

*Total Burden Hours:* 5,500.

Dated: March 22, 1992.

Naomi B. Marr,

Director, Office of Information Systems Management.

[FR Doc. 92-7869 Filed 4-9-92; 8:45 am]

BILLING CODE 4130-01-M

## Food and Drug Administration

### Advisory Committee Meeting; Amendment of Notice

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an amendment to a notice of meeting of the Cardiovascular and Renal Drugs Advisory Committee which is scheduled for April 30 and May 1, 1992. This meeting was announced in the *Federal Register* of March 19, 1992 (57 FR 9557). The amendment is being made to reflect a change in the location of the April 30th meeting. There are no other changes.

#### FOR FURTHER INFORMATION CONTACT:

Joan C. Standaert, Center for Drug Evaluation and Research (HFD-110), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 419-259-6211.

**SUPPLEMENTARY INFORMATION:** In the *Federal Register* of March 19, 1992 (57 FR 9557), FDA announced that a meeting of the Cardiovascular and Renal Drugs Advisory Committee would be held on April 30, 1992, at the Jack Masur Auditorium, Clinical Center, Bldg. 10, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD. On pages 9557 and 9558, columns 3 and 1,

respectively, the location for this meeting is amended to read as follows:

*Date, time, and place.* April 30, 1992, 9 a.m., Holiday Inn-Crowne Plaza, Plazas II and III, 1750 Rockville Pike, Rockville, MD, and May 1, 1992, 9 a.m., Conference Rm. B, Parklawn Bldg., 5600 Fishers Lane, Rockville, Md.

Dated: April 6, 1992.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 92-8298 Filed 4-9-92; 8:45 am]

BILLING CODE 4160-01-M

## Health Resources and Services Administration

### Availability of Funds for New Community and Migrant Health Centers and Expanded Community and Migrant Health Center Activities

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice of availability of funds.

**SUMMARY:** The Health Resources and Services Administration announces the availability of discretionary grant funds of approximately \$30 million in fiscal year (FY) 1992 under sections 330 and 329 of the Public Health Service (PHS) Act to establish new community health centers (CHCs) and migrant health centers (MHCs) and to expand existing C/MHCs into new areas.

The PHS is committed to achieving the health promotion and disease prevention objectives of Healthy People 2000, a PHS-led national activity. The health center program directly addresses the Healthy People 2000 objectives by improving access to preventive and primary care services for underserved populations, especially minority and other disadvantaged populations. Potential applicants may obtain a copy of Healthy People 2000 (Full Report: Stock No. 017-001-00474-0) or Healthy People 2000 (Summary Report: Stock No. 017-001-00473-01) through the Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325 (Telephone 202-783-3228).

**ADDRESSES:** The PHS Regional Grants Management Officers (RGMOs) whose names and addresses are provided in the appendix to this document are responsible for distributing application kits and guidance (Form PHS 5161-1 with revised face sheets DHHS Form 424, as approved by the OMB under control number 0937-0189), and completed applications must be submitted to them. Application kits contain guidance information which

incorporates new and updated program requirements arising from changes in the program's authorizing legislation. Potential applicants, either existing or new organizations, should contact the appropriate RGMO. The RGMO can also provide assistance on business management issues. For the Migrant Health Outreach Initiative, a separate application guidance and application kit will be available by March 1, 1992 through the PHS RGMOs.

**DATES:** Applications are due June 1, 1992. Applications shall be considered to have met the deadline if they are: (1) Received on or before the deadline date; or (2) postmarked before the deadline date and received in time for orderly processing. Untimely applications will be returned to the applicant. Applicants should obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service or request a legibly dated U.S. Postal Service postmark. Private metered postmarks shall not be accepted as proof of timely mailing.

#### FOR FURTHER INFORMATION CONTACT:

For general program information and technical assistance, contact Richard C. Bohrer, Director of Primary Care Services, 5600 Fishers Lane, room 7A-55, Rockville, MD 20857 (301) 443-2260.

#### SUPPLEMENTARY INFORMATION:

##### 1. Community Health Centers

*Grant Amounts:* Approximately \$25 million in discretionary grants to establish new CHCs and/or to expand existing CHCs into new areas will be made available under section 330 of the PHS Act (42 U.S.C. 254c).

*Number of Awards:* Approximately 60 to 70 awards will be made, ranging from \$300,000 to \$700,000. Approximately half of these awards will be for new CHCs and half will be for the expansion of existing CHCs into new areas. Awards will be made for a one year budget period. Project periods for new CHCs will be for up to two years, while expansion grants will have project periods consistent with the ongoing grant.

*Eligible Applicants:* Eligible applicants for new CHCs are public or private nonprofit entities whose proposed service area is not currently being served by a Federally funded CHC. The proposed service area must be a defined geographical area or population which is Federally designated, in whole or in part, a Medically Underserved Area (MUA) or Medically Underserved Population (MUP). Applicants must be prepared to provide the comprehensive primary health services required under section



330, and supplemental services necessary to assure that required primary health services are provided effectively.

Eligible applicants for expansions into new areas must either be: (1) Current recipients of section 330 funds or (2) recipients of section 329 funds requesting section 330 support for primary health services to other than migrant and seasonal farmworkers and their families. Applicants must be prepared to provide the comprehensive primary health services required under section 330, and supplemental services necessary to assure that required primary health care services are provided effectively. The proposed service area must be a defined geographical area or population which is Federally designated, in whole or in part, as a MUA/MUP and which is currently not being served by a Federally funded CHC. Expansions into service areas of existing section 330 projects are not eligible for consideration.

**Criteria for Evaluation:** When determining whether Federal support will be made available, the Department will review the applications for compliance with standard criteria stipulated in the program regulations (42 CFR 51c.305). These include:

(a) The relative need of the populations to be served for the services to be provided based on the following indicators:

**For urban applicants:** (1) Percentage of the population with incomes below 200% of the official poverty level; (2) infant mortality rate (IMR) of 12.0, or above, or a low birthweight rate of 9 percent, or above, of all live births; (3) minority population of 25% or more; (4) shortage of necessary primary care health professionals to meet the needs of the population; and (5) other documented special access or health factors such as disparities in health status, high unemployment, high uninsured population, significant elderly population, cultural/language differences, excessive time or travel distances to access care, or prevalence of conditions such as HIV, substance abuse, or teen pregnancy.

**For rural applicants:** (1) Percentage of the population with incomes below 200% of the official poverty level; (2) infant mortality rate (IMR) of 10.1, or above, or a low birthweight rate of 6.9 percent, or above, of all live births; (3) geographic barriers based on average travel time/distance to next nearest source of primary care that is accessible to Medicaid recipients and/or uninsured low income people in need of a sliding fee schedule; (4) shortage of necessary

primary care health professionals to meet the needs of the population; and (5) other documented special access or health factors such as disparities in health status, high unemployment, uninsured, minority, elderly, farmworkers;

(b) The extent to which the applicant's project plan meets the program requirements;

(c) The applicant's capability in the following health services/clinical management areas: (1) Provision of required primary (including preventive) health services; (2) provision of required supplemental health services necessary for the adequate support of primary health services; (3) provision of patient case management; (4) assurance of continuity of care; (5) a health care plan responsive to community needs, i.e., a plan that addresses the priority health problems of the user/service area population; (6) a quality assurance program; (7) an appropriate number and mix of primary care physicians, non-physician primary care providers and clinical support staff; and (8) provision of translation services—if a substantial number of the individuals in the population served by a center are of limited English-speaking ability, the services of appropriate personnel fluent in the language spoken by a predominant number of such individuals is necessary.

(d) The degree to which the applicant ensures that its governing board is appropriately structured and has by-laws reflecting all its functions and responsibilities. A public entity must be able to meet all governance requirements or have an acceptable co-applicant board (governing boards of public centers by statute are not required to set general policies for the center);

(e) The administrative and management capability of the applicant, particularly the extent to which center operations will emphasize efficiency of operations and sound financial management;

(f) The degree to which the applicant intends to integrate its services with other Federal programs or projects, as well as the degree of collaboration with State and local health departments, health professions training programs, and other health and social services providers; and

(g) Whether the proposed expansion will result in a new access point with at least 80% of the potential medical users coming from an area not currently being served.

In selecting applications for funding, preference will be given to approved applicants which propose to serve an

area that is not currently receiving Bureau of Health Care Delivery and Assistance (BHCDA) support.

Grant awards will be made in such a manner as to provide for an appropriate distribution of resources throughout the country in both urban and rural areas.

## 2. Migrant Health Centers

**Grant Amounts:** Approximately \$3.5 million in discretionary grants to establish new MH centers or programs and/or to expand the capacity of existing MH centers or programs will be made available under section 329 of the PHS Act (42 U.S.C. 254b). In addition, approximately \$1.5 million will be made available for new outreach initiatives to migrant farmworkers and their families.

**Number of Awards:** A total of approximately 15 awards will be made for new centers, programs and expansions, ranging from \$50,000 to \$300,000. Approximately a quarter of these awards will be for new MH centers/programs and three-quarters will be for the expansion of existing MH centers/programs. Awards will be made for a one year budget period, with project periods of up to two years. A total of approximately 15 awards will be made available for the new outreach initiatives, ranging from \$50,000 to \$200,000. Awards will be made for a one year budget period, with a one year project period.

**Eligible Applicants:** Migrant health "centers" and "programs" have different requirements under the authorizing legislation and its implementing regulations. MH "centers" must offer a full range of specified primary and supplemental services and serve a "high impact area", i.e., an area having not less than 4,000 migratory agricultural workers and seasonal workers residing in its boundaries for more than two months in any calendar year. (See section 329(d)(1)(A), PHS Act, and 42 CFR Part 56, subpart C). On the other hand, MH "programs" may be funded in areas where there is no MH "center" and in which not more than 4,000 migratory agricultural workers and their families reside for more than two months. The range of services which a "program" must provide is more limited than that of a "center". (See section 329(d)(1)(B), PHS Act, and 42 CFR Part 56, subpart F).

Eligible applicants for new starts are public or private nonprofit entities whose proposed service area is not currently served by a Federally funded MH "center" or MH "program". Applicants must be prepared to provide comprehensive primary health services to migrant and seasonal farmworkers



and their families in a defined service area as required under section 329, and supplemental services necessary to assure the effectiveness of required primary health services (although, as noted, the services required of "programs" are more limited).

Eligible applicants for expansions must either be: (1) Current recipients of section 329 funds or (2) recipients of section 330 funds requesting section 329 support for primary health care services to migrant and seasonal farmworkers and their families. Applicants must be prepared to provide comprehensive primary health services to migrant and seasonal farmworkers and their families as required under section 329, and supplemental services necessary to assure the effectiveness of required primary health services.

Eligible applicants for the new outreach initiatives are existing section 329 migrant health "centers" or "programs". There are a number of documented access problems faced by migrant farmworkers which include frequent travel, isolated housing, language/cultural differences, and transportation problems. A major objective of this initiative is to increase access to care through expanded effective outreach programs.

**Criteria for Evaluation:** Eligible applicants for new and expansion MH grants, as well as the new outreach initiatives, will be evaluated in accordance with the standard criteria stipulated in the program regulations (42 CFR 56.305 for MH "centers" and 42 CFR 56.604 for MH "programs"). These include:

(a) The relative need of the population to be served for the services to be provided, specifically: (1) Number of migrant farmworkers and length of stay in the service area (The Atlas Of State Profiles Which Estimate Number of MSFW will be used as the data source). Potential applicants may obtain a copy through the National Clearinghouse for Primary Care Information, 8201 Greensboro Drive, Suite 600, McLean, Va. 22102 (Telephone: (703) 821-8955, Ext. 316); (2) number of seasonal farmworkers in the service area (The Atlas Of State Profiles Which Estimate Number of MSFW will be used as the data source.); (3) documented increase in the number of migrant and seasonal farmworkers in the service area, 20 percent or more in the last five years; (4) a shortage of necessary and accessible primary care health professionals to meet the needs of the migrant population; (5) the current penetration rate and cost effectiveness of an existing section 329 funded MH "center" or "program" in meeting the needs of the

target population; and (6) other documented special health factors such as environmental health problems, cultural/language differences, or prevalence of conditions such as HIV, substance abuse, teen pregnancy, high risk perinatals, dental disease, sexually transmitted diseases (STDs), and tuberculosis (TB);

(b) The extent to which applicant's project plan meets the program requirements;

(c) The applicant's capability in the following health services/clinical management areas: (1) Provision of required primary (including preventive) health services; (2) provision of required ancillary and supplemental health services necessary for the adequate support of primary health services; (3) provision for referral and follow-up using a patient case management strategy; (4) assurance of continuity of care; (5) a health care plan responsive to community needs, i.e., a plan that addresses the priority health problems of the user/service area population; (6) A quality assurance program; (7) an appropriate number and mix of primary care physicians, non-physician primary care providers and clinical support staff; (8) provision of outreach and health education services and health promotion services; (9) provision of environmental health services; and (10) provision of translation services—if a substantial number of the individuals in the population served by a center are of limited English-speaking ability, the services of appropriate personnel fluent in the language spoken by a predominant number of such individuals is necessary;

(d) The degree to which the applicant ensures that its governing board is appropriately structured and has by-laws reflecting all its functions and responsibilities. A public entity must meet all governance requirements or have an acceptable co-applicant board (governing boards of public centers by statute are not required to set general policies for the center);

(e) The administrative and management capability of the applicant, particularly the extent to which center operations will emphasize efficiency of operations and sound financial management;

(f) The degree to which the applicant intends to integrate its services with other Federal programs or projects, as well as the degree of collaboration with State and local health departments, health professions training programs, and other health and social services providers;

(g) Whether the proposed expansion will result in a new access point with no

less than 100% of the new medical users coming from the migrant/seasonal farmworker target population in the service area not currently being served; or whether the proposed expansion will result in new service capacity of the existing delivery point/points with no less than 100% of the new medical users coming from the migrant/seasonal farmworker target population; and

(h) Awards for the new outreach initiatives will be largely based on the need criteria for migrant farmworkers identified for new start and expansions. In addition, existing MH centers/programs which demonstrate innovative models of health care outreach which are an integral part of the health care system and demonstrate an integrated approach to case management will be sought. These systems should provide or coordinate preventive and/or primary care services and increase accessibility, acceptability and appropriateness of health services to migrant farmworkers. These innovative systems may include the feasibility of the use of portable or mobile equipment as an effective means of meeting the needs of the target population. Applicants having a formal and direct partnership with two or more health care and social service providers which include rural health clinics, hospitals, mental health centers, public health departments, social service agencies, health professions schools, and other migrant service providers will also be sought.

In selecting applications for funding, preference for new starts will be given to approved applicants that will establish access for migrant or seasonal farmworkers in an unserved county, i.e., one with no Federal presence. For expansions, preference will be given to approved applicants that will increase access for migrant and seasonal farmworkers. For outreach initiatives, preference will be given to approved applicants that will increase access for migrant farmworkers.

### 3. Capital Needs

With respect to both C/MHCs, major capital needs are expected to be supported with State, local or other funds, with Federal participation limited to \$200,000 to be provided either as a one-time award or incrementally to cover longer-term debt reduction. Requests in excess of \$200,000 will be considered on a case-by-case basis, with priority given to applicants requesting assistance in correcting fire and life safety code violations. Preference for other major capital proposals will be given to applicants requesting assistance in amortizing



multi-year loans for facility acquisition, construction, or renovation. Applicants requiring a capital investment must have a facility utilization plan which addresses, at a minimum, (1) the alternatives considered and the basis for the option selected, (2) the adequacy of the proposed facility to reasonably meet foreseeable needs based on projected demand, (3) the total cost of the proposal and how it is to be financed, and (4) the efforts at fundraising from local, State, national, private, public and other governmental sources.

**Opportunity for Comment:** Interested persons are invited to comment on the proposed funding preferences for new starts and expansions under sections 330 and 329. Normally, the comment period would be 60 days. However, due to need to implement any changes for the fiscal year 1992 award cycle, the comment period has been reduced to 30 days. All comments received on or before May 11, 1992 will be considered before the proposed funding preferences are finalized. No funds will be allocated or final selections made until a final notice is published indicating whether the proposed funding preferences will be applied.

Written comments should be addressed to: Richard C. Bohrer, Director of Primary Care Services, Bureau of Health Care Delivery and Assistance, Health Resources and Services Administration, 5600 Fishers Lane, room 7A-55, Rockville, MD 20857 (301) 443-2260. All comments received will be available for public inspection and copying at the Division of Primary Care Services, at the above address, weekdays (Federal holidays excepted) between the hours of 8:30 a.m. and 5 p.m.

**Other Award Information:** All grants to be awarded under this notice are subject to the provisions of Executive Order 12372, as implemented by 45 CFR part 100, which allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. The application kit will contain a listing of States which have chosen to set up a review system and will identify a State Single Point of Contact (SPOC) in each State for the review. Applicants (other than federally-recognized Indian tribal governments) should contact their SPOCs as early as possible to alert them to the prospective applications and receive any necessary instructions on State process. For proposed projects serving more than one State, the applicant is advised to contact

the SPOC of each affected State. State process recommendations should be submitted to the appropriate Regional Office (see appendix). The due date for State process recommendations is 60 days after the appropriate application deadline date. The Bureau of Health Care Delivery and Assistance does not guarantee that it will accommodate or explain its response to State process recommendations received after this date.

In the OMB Catalog of Federal Domestic Assistance, the Community Health Center program is listed as Number 93.224 and the Migrant Health Center program is listed as Number 93.246.

Dated: February 5, 1992.

Robert G. Harmon,  
Administrator.

#### Appendix—Regional Grants Management Officers

**Region I:** Mary O'Brien, Grants Management Officer, PHS Regional Office I, John F. Kennedy Federal Building, Boston, MA 02203, (617) 565-1482.

**Region II:** Steven Wong, Grants Management Officer, PHS Regional Office II, room 3300, 26 Federal Plaza, New York, NY 10278, (212) 264-4496.

**Region III:** Martin Bree, Acting Grants Management Officer, PHS Regional Office III, P.O. Box 13716, Philadelphia, PA 19101, (215) 596-6653.

**Region IV:** Wayne Cutchens, Grants Management Officer, PHS Regional Office IV, room 1106, 101 Marietta Tower, Atlanta, GA 30323, (404) 331-2597.

**Region V:** Lawrence Poole, Grants Management Officer, PHS Regional Office V, 105 West Adams Street, 17th Floor, Chicago, IL 60603, (312) 353-8700.

**Region VI:** James A. Doss, Acting Grants Management Officer, PHS Regional Office VI, 1200 Main Tower, Dallas, TX 75202, (214) 767-3885.

**Region VII:** Michael Rowland, Grants Management Officer, PHS Regional Office VII, room 501, 601 East 12th Street, Kansas City, MO 64016, (816) 426-5841.

**Region VIII:** Jerry F. Wheeler, Grants Management Officer, PHS Regional Office VIII, 1961 Stout Street, Denver, CO 80294, (303) 844-4461.

**Region IX:** Linda Gash, Grants Management Officer, PHS Regional Office IX, 50 United Nations Plaza, San Francisco, CA 94102, (415) 556-2595.

**Region X:** James Tipton, Grants Management Officer, PHS Regional Office X, Mail Stop RX 20, 2201 Sixth

Avenue, Seattle, WA 98121, (206) 553-7997.

[FR Doc. 92-8361 Filed 4-9-92; 8:45 am]

BILLING CODE 4160-15-M

#### Public Health Service

#### Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Public Health Service (PHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The following requests have been submitted to OMB since the list was last published on Friday, March 27, 1992.

(Call PHS Reports Clearance Officer on 202-245-2100 for copies of package)

1. Infant Formula Record and Record-Retention Requirements—21 CFR part 106—0910-0256—Record maintenance and record-retention requirements for infant formula microbiological and nutrient testing, consumer complaint investigations, and quality assurance procedures are necessary to assure the safety of the infant formula by establishing that appropriate nutrient levels are present. These regulations affect infant formula manufacturers and premix suppliers. **Respondents:** Businesses or other for-profit. **Number of Respondents:** 5; **Number of Responses per Respondent:** 0; **Average Burden per Response:** 7,980 hours; **Estimated Burden Hours:** 39,900.

2. Community Models for Diabetes Prevention and Control—New—This submission is for a pilot household survey to field test survey protocols, provide preliminary estimates of diabetes prevalence, and obtain the information necessary to design and implement subsequent community diabetes surveys. Information from the study activities will be used to plan and develop baseline community surveys and intervention activities, evaluating the burden of diabetes in a high-risk community. **Respondents:** Individuals or households.

Title	Number of respondents	Number of responses per respondent	Average burden per response
Screeners...	1,348	1	.25 hr.



Title	Number of respondents	Number of responses per respondent	Average burden per response
Questionnaires + 1 finger stick.	819	1	1.5 hrs.
Questionnaires for eligibles + 2 finger-sticks.	1,151	1	1.175 hrs.
Clinic Questionnaires.	300	1	1 hr.
Clinical Procedures.	300	1	1.75 hrs.

*Estimated Total Annual Burden—*  
4,709 hours.

3. Statement in Support of Application for Waiver of Excludability Under sections 212(a) (1) and (3) of the Immigration and Nationality Act—0920-0006—Aliens who are mentally retarded or who have had one or more attacks of insanity are eligible to apply for waiver of excludability under sections 212(a) (1) and (3) of the Immigration and Nationality Act. If accepted, the applicant's sponsor must locate a medical facility or specialist in the U.S. that agrees to follow the applicant for 5 years and to send in annual reports on the applicant's mental health status. *Respondents:* Individuals or households; Businesses or other for-profit; Small businesses or organizations. *Number of Respondents:* 300; *Number of Responses per Respondent:* 1; *Average Burden Per Response:* .176 hour; *Estimated Burden Hours:* 53.

4. Health Professions Student Loans (HPSL) and Nursing Students Loans (NSL)—Cash Management (42 CFR part 57)—0915-0137—Participating health professions schools are required to review and assess annually the collectibility of their loans. If in a school's determination a loan is uncollected, it must request the Department's approval to write off the loan, providing documentation of due diligence in collection efforts. *Respondents:* Nonprofit institutions.

Title	Number of respondents	Number of responses per respondent	Average burden per response
HPSL/NSL Review and Report—Cash Balance of Student Loan Fund (57.205 (a)(2) and 57.305 (a)(2)) <sup>1</sup> .	—	—	—
HPSL/NSL Requests for Write-off of Uncollectible Loans (57.210 (b)(4)(i) and (57.310 (b)(4)(i)).	300	1.5	.05 hrs.

<sup>1</sup> Burden carried with application OMB No. 0915-0044 and 0915-0046.

*Estimated Total Annual Burden ....* 230 hours

*Desk Officer:* Shannah Koss-McCallum.

Written comments and recommendations for the proposed information collections should be sent within 30 days of this notice directly to the OMB Desk Officer designated above at the following address: Human Resources and Housing Branch, New Executive Office Building, room 3002, Washington, DC 20503.

Dated: April 6, 1992.

Phyllis M. Zucker,

*Acting Deputy Director, Office of Health Planning and Evaluation.*

[FR Doc. 92-8320 Filed 4-9-92; 8:45 am]

BILLING CODE 4160-17-M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of Administration

[Docket No. N-92-3425]

### Submission of Proposed Information Collection to OMB

**AGENCY:** Office of Administration, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is

soliciting public comments on the subject proposal.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Jennifer Main, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

### FOR FURTHER INFORMATION CONTACT:

Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708-0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

**SUPPLEMENTARY INFORMATION:** The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35).

The Notice lists the following information:

- (1) The title of the information collection proposal;
- (2) The office of the agency to collect the information;
- (3) The description of the need for the information and its proposed use;
- (4) The agency form number, if applicable;
- (5) What members of the public will be affected by the proposal;
- (6) How frequently information submissions will be required;
- (7) An estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response;
- (8) Whether the proposal is new or an extension, rein statement, or revision of an information collection requirement; and
- (9) The names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

**Authority:** Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: April 2, 1992.

John T. Murphy,

*Director, Information Resources Management Policy and Management Division.*

**Proposal:** Annual Adjustments of Contract Rents for Section 8 Assisted Housing: Comparability Studies (FR-2822).

**Office:** Housing.



*Description of the Need for the Information and its Proposed Use:* Section 8(c)(2)(C) of the U.S. Housing Act of 1937 provides that rent adjustments shall not result in a material difference between rents for

assisted and comparable unassisted units. Comparability studies will be performed to enforce this requirement.  
*Form Number:* None.  
*Respondents:* State or Local Governments, Businesses or Other For-

Profit, Federal Agencies or Employees, and Non-Profit Institutions.

*Frequency of Submission:* On Occasion.

*Reporting Burden:*

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Information collection.....	498		1		6.63		3,305

*Total Estimated Burden Hours:* 3,305.  
*Status:* New.

*Contact:* Michelle McLaurin, HUD,  
 (202) 708-3944, Jennifer Main, OMB,  
 (202) 395-6880.

Dated: April 2, 1992.  
 [FR Doc. 92-8317 Filed 4-9-92; 8:45 am]  
 BILLING CODE 4210-01-M

#### Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-92-1917; FR-2934-N-73]

#### Federal Property Suitable as Facilities to Assist the Homeless

**AGENCY:** Office of the Assistant  
Secretary for Community Planning and  
Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice identifies  
unutilized, underutilized, excess, and  
surplus Federal property reviewed by  
HUD for suitability for possible use to  
assist the homeless.

**ADDRESSES:** For further information,  
contact James N. Forsberg, room 7262,  
Department of Housing and Urban  
Development, 451 Seventh Street SW.,  
Washington, DC 20410; telephone (202)  
708-4300; TDD number of the hearing-  
and speech-impaired (202) 708-2565  
(these telephone numbers are not toll-  
free), or call the toll-free title V  
information line at 1-800-927-7588.

**SUPPLEMENTARY INFORMATION:** In  
accordance with 56 FR 23789 (May 24,  
1991) and section 501 of the Stewart B.  
McKinney Homeless Assistance Act (42  
U.S.C. 11411), as amended, HUD is  
publishing this notice to identify Federal  
buildings and other real property that  
HUD has reviewed for suitability for use  
to assist the homeless. The properties  
were reviewed using information  
provided to HUD by Federal  
landholding agencies regarding  
unutilized and underutilized buildings

and real property controlled by such  
agencies or by GSA regarding its  
inventory of excess or surplus Federal  
property. This Notice is also published  
in order to comply with the December  
12, 1988 Court Order in *National  
Coalition for the Homeless v. Veterans  
Administration*, No. 88-2503-OG  
(D.D.C.).

Properties reviewed are listed in this  
notice according to the following  
categories: Suitable/available, suitable/  
unavailable, suitable/to be excess, and  
unsuitable. The properties listed in the  
three suitable categories have been  
reviewed by the landholding agencies,  
and each agency has transmitted to  
HUD: (1) Its intention to make the  
property available for use to assist the  
homeless, (2) its intention to declare the  
property excess to the agency's needs,  
or (3) a statement of the reasons that the  
property cannot be declared excess or  
made available for use as facilities to  
assist the homeless.

Properties listed as suitable/available  
will be available exclusively for  
homeless use for a period of 60 days  
from the date of this notice. Homeless  
assistance providers interested in any  
such property should send a written  
expression of interest to HHS,  
addressed to Judy Breitman, Division of  
Health Facilities Planning, U.S. Public  
Health Service, HHS, room 17A-10, 5600  
Fishers Lane, Rockville, MD 20857; (301)  
443-2265. (This is not a toll-free  
number.) HHS will mail to the interested  
provider an application packet, which  
will include instructions for completing  
the application. In order to maximize the  
opportunity to utilize a suitable  
property, providers should submit their  
written expressions of interest as soon  
as possible. For complete details  
concerning the processing of  
applications, the reader is encouraged to  
refer to the interim rule governing this  
program, 56 FR 23789 (May 24, 1991).

For properties listed as suitable/to be  
excess, that property may, if  
subsequently accepted as excess by

GSA, be made available for use by the  
homeless in accordance with applicable  
law, subject to screening for other  
Federal use. At the appropriate time,  
HUD will publish the property in notice  
showing it as either suitable/available  
or suitable/unavailable.

For properties listed as suitable/  
unavailable, the landholding agency has  
decided that the property cannot be  
declared excess or made available for  
use to assist the homeless, and the  
property will not be available.

Properties listed as unsuitable will not  
be made available for any other purpose  
for 20 days from the date of this notice.  
Homeless assistance providers  
interested in a review by HUD of the  
determination of unsuitability should  
call the toll free information line at 1-  
800-927-7588 for detailed instructions or  
write a letter to James N. Forsberg at the  
address listed at the beginning of this  
notice. Included in the request for  
review should be the property address  
(including zip code), the date of  
publication in the *Federal Register*, the  
landholding agency, and the property  
number.

For more information regarding  
particular properties identified in this  
notice (i.e., acreage, floor plan, existing  
sanitary facilities, exact street address),  
providers should contact the appropriate  
landholding agencies at the following  
address: U.S. Army: Robert Conte, Dept.  
of Army, Military Facilities, DAEN-  
ZCI-P; rm. 1E671, Pentagon,  
Washington, DC 20310-2600; (703) 693-  
4583; Corps of Engineers: Bob  
Swieconeck, Headquarters, Army Corps  
of Engineers, attn: CERE-MM, room  
4224, 20 Massachusetts Ave. NW.,  
Washington, DC 20314-1000; (202) 272-  
1750; GSA: Ronald Rice, Federal  
Property Resources Services, GSA, 18th  
and F Streets NW., Washington, DC  
20405; (202) 501-0067; (These are not  
toll-free numbers).



Dated: April 3, 1992.

Paul Roitman Bardack,  
Deputy Assistant Secretary for Economic  
Development.

**TITLE V, FEDERAL SURPLUS PROPERTY  
PROGRAM—FEDERAL REGISTER REPORT  
FOR 04/10/92**

**Suitable/Available Properties**

*Buildings (by State)*

**District Of Columbia**

Bldg. 81, Fort McNair  
Washington DC 20319-5050  
Landholding Agency: Army  
Property Number: 219210282  
Status: Unutilized  
Comment: 2460 sq. ft., storage shed, open on  
one side, off-site use only.

**Kansas**

Bldg. T-1351, Fort Riley  
Ft. Riley Co: Geary KS 66442-  
Landholding Agency: Army  
Property Number: 219210284  
Status: Unutilized  
Comment: 4862 sq. ft., 2 story wood frame,  
most recent use—barracks needs rehab,  
presence of asbestos.

Bldg. T-1363, Fort Riley  
Ft. Riley Co: Geary KS 66442-  
Landholding Agency: Army  
Property Number: 219210285  
Status: Unutilized  
Comment: 1190 sq. ft., 1 story wood frame,  
most recent use—admin., needs rehab,  
presence of asbestos.

Bldg. T-2153, Fort Riley  
Ft. Riley Co: Geary KS 66442-  
Landholding Agency: Army  
Property Number: 219210286  
Status: Unutilized  
Comment: 4826 sq. ft., 2 story wood frame,  
most recent use—barracks needs rehab,  
presence of asbestos.

Bldg. T-2336, Fort Riley  
Ft. Riley Co: Geary KS 66442-  
Landholding Agency: Army  
Property Number: 219210287  
Status: Unutilized  
Comment: 2345 sq. ft., 1 story wood frame,  
most recent use—admin., needs rehab,  
presence of asbestos.

**Kentucky**

Bldg. 5001, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210298  
Status: Unutilized  
Comment: 7670 sq. ft., 2 story, presence of  
asbestos, needs rehab, most recent use—  
bachelor's officers quarters, off-site use  
only.

Bldg. 5002, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210299  
Status: Unutilized  
Comment: 7670 sq. ft., 2 story, needs rehab,  
presence of asbestos, most recent use—  
bachelor's officers quarters, off-site use  
only.

Bldg. 5003, Fort Knox  
Ft. Knox Co: Hardin KY 40121-

Landholding Agency: Army  
Property Number: 219210300  
Status: Unutilized  
Comment: 2996 sq. ft., 1 story, needs rehab,  
presence of asbestos, most recent use—  
storage, off-site use only.

Bldg. 5004, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210301  
Status: Unutilized  
Comment: 7670 sq. ft., 2 story, needs rehab,  
presence of asbestos, most recent use—  
bachelor's officers quarters, off-site use  
only.

Bldg. 2706, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210302  
Status: Unutilized  
Comment: 4720 sq. ft., 2 story, most recent  
use—storage/admin, off-site use only.

Bldg. 2718, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210303  
Status: Unutilized  
Comment: 4720 sq. ft., 2 story, presence of  
asbestos, most recent use—classroom/  
admin, off-site use only.

Bldg. 2839, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210304  
Status: Underutilized  
Comment: 1600 sq. ft., 1 story, intermittently  
used, most recent use—storage/office, off-  
site use only.

Bldg. 2843, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210305  
Status: Unutilized  
Comment: 1450 sq. ft., 1 story, needs rehab,  
most recent use—storage, off-site use only.

Bldg. 2845, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210306  
Status: Unutilized  
Comment: 1144 sq. ft., 1 story, needs rehab,  
most recent use—storage, off-site use only.

Bldg. 2918, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210307  
Status: Unutilized  
Comment: 1600 sq. ft., 1 story, presence of  
asbestos, most recent use—admin./storage,  
off-site use only.

Bldg. 4065, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210308  
Status: Unutilized  
Comment: 6884 sq. ft., 1 story, needs rehab,  
most recent use—offices/classroom/  
storage, off-site use only.

Bldg. 4066, Fort Knox  
Ft. Knox Co: Hardin KY 40121-  
Landholding Agency: Army  
Property Number: 219210309  
Status: Unutilized

Comment: 2250 sq. ft., 1 story, needs rehab,  
most recent use—storage/offices, off-site  
use only.

**Missouri**

Bldg. T2132  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210243  
Status: Underutilized  
Comment: 1296 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. 2365  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210244  
Status: Underutilized  
Comment: 1676 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. 2127  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210245  
Status: Underutilized  
Comment: 2895 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. 2118  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210246  
Status: Underutilized  
Comment: 2895 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. 2138  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210247  
Status: Underutilized  
Comment: 2284 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. P601  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210248  
Status: Underutilized  
Comment: 4194 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. T1910  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210249  
Status: Underutilized  
Comment: 2740 sq. ft., 1 story, presence of  
asbestos, off-site use only.

Bldg. T2115  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army  
Property Number: 219210250  
Status: Underutilized  
Comment: 4720 sq. ft., 2 story, most recent  
use—barracks, presence of asbestos, off-  
site use only.

Bldg. T2116  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-5000  
Landholding Agency: Army



Bldg. T3055  
Fort Leonard Wood  
Ft. Leonard Wood Co: Pulaski MO 65473-500  
Landholding Agency: Army  
Property Number: 219210278  
Status: Underutilized



Comment: 5310 sq. ft., 2 story, most recent use—barracks, presence of asbestos, off-site use only.

#### Bldg. 421

Fort Leonard Wood

Ft. Leonard Wood Co: Pulaski MO 65473-5000

Landholding Agency: Army

Property Number: 219210277

Status: Unutilized

Comment: 2 story, needs repair, most recent use—office, presence of asbestos, off-site use only.

#### Nebraska

##### Bldg. RG-1

Cornhusker Army Ammunition Plant

Old Potash Hwy

Grand Island Co: Hall NE 68803-

Landholding Agency: Army

Property Number: 219210292

Status: Unutilized

Comment: 1080 sq. ft., 1 story garage, possible asbestos, secured area with alternate access.

##### Bldg. RG-2

Cornhusker Army Ammunition Plant

Old Potash Hwy

Grand Island Co: Hall NE 68803-

Landholding Agency: Army

Property Number: 219210293

Status: Unutilized

Comment: 576 sq. ft., 1 story garage, secured area with alternate access.

##### Bldg. RG-3

Cornhusker Army Ammunition Plant

Old Potash Hwy

Grand Island Co: Hall NE 68803-

Landholding Agency: Army

Property Number: 219210294

Status: Unutilized

Comment: 936 sq. ft., 1 story garage, possible asbestos, secured area with alternate access.

##### Bldg. RG-4

Cornhusker Army Ammunition Plant

Old Potash Hwy

Grand Island Co: Hall NE 68803-

Landholding Agency: Army

Property Number: 219210295

Status: Unutilized

Comment: 1040 sq. ft., 1 story garage, possible asbestos, secured area with alternate access.

##### Bldg. RG-5

Cornhusker Army Ammunition Plant

Old Potash Hwy

Grand Island Co: Hall NE 68803-

Landholding Agency: Army

Property Number: 219210296

Status: Unutilized

Comment: 490 sq. ft., 1 story garage, possible asbestos, secured area with alternate access.

##### Bldg. RG-6

Cornhusker Army Ammunition Plant

Old Potash Hwy

Grand Island Co: Hall NE 68803-

Landholding Agency: Army

Property Number: 219210297

Status: Unutilized

Comment: 510 sq. ft., 1 story garage, possible asbestos, secured area with alternate access.

#### New Jersey

Bldg. 5316, Fort Dix

#### Snyder Avenue

Ft. Dix Co: Burlington NJ 08640-

Landholding Agency: Army

Property Number: 219210280

Status: Unutilized

Comment: 700 sq. ft., 1 story cinder block structure, windowless.

Bldg. 9111, Evans Area

Fort Monmouth

Watson Avenue

Wall Co: Monmouth NJ 07719-

Landholding Agency: Army

Property Number: 219210288

Status: Unutilized

Comment: 1126 sq. ft., 1 story, needs major repairs, possible asbestos.

Bldg. 9113, Evans Area

Fort Monmouth

Watson Avenue

Wall Co: Monmouth NJ 07719-

Landholding Agency: Army

Property Number: 219210289

Status: Unutilized

Comment: 2000 sq. ft., 1 story, needs major repairs, possible asbestos.

Bldg. 9126, Evans Area

Fort Monmouth

Watson Avenue

Wall Co: Monmouth NJ 07719-

Landholding Agency: Army

Property Number: 219210290

Status: Unutilized

Comment: 384 sq. ft., 1 story, needs major repairs, possible asbestos.

Bldg. 2534, Charles Wood Area

Fort Monmouth

Tinton Falls Co: Monmouth NJ

Landholding Agency: Army

Property Number: 219210291

Status: Unutilized

Comment: 5307 sq. ft., 2 story, most recent use—storage, needs rehab, possible asbestos.

#### Texas

Bldg. 2208, Fort Hood

Headquarters Avenue

Ft. Hood Co: Coryell TX 76544-

Landholding Agency: Army

Property Number: 219210283

Status: Unutilized

Comment: 4779 sq. ft., 2 story wood structure, needs rehab, most recent use—photo lab.

#### Virginia

Bldg. 586, Open Mess

Fort Story

Atlantic Avenue

Ft. Story Co: Princess Ann VA 23459-5000

Landholding Agency: Army

Property Number: 219210281

Status: Unutilized

Comment: 15,919 sq. ft., 2 story wood structure, needs repair, possible asbestos, most recent use—NCO Club.

#### Wisconsin

Bldg. 2112, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210310

Status: Unutilized

Comment: 582 sq. ft., 1 story, most recent use—ice house, needs repair.

Bldg. 212, Fort McCoy

#### U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210311

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 213, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210312

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 214, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210313

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 218, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210314

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 219, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210315

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 220, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210316

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 223, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210317

Status: Underutilized

Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 224, Fort McCoy

U.S. Highway 21

Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army

Property Number: 219210318



Status: Underutilized  
Comment: 5310 sq. ft., 2 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—housing.

Bldg. 407, Fort McCoy  
US Highway 21  
Ft. McCoy Co: Monroe WI 54656  
Landholding Agency: Army  
Property Number: 219210333

Bldg. 418, Fort McCoy  
US Highway 21  
Ft. McCoy Co: Monroe WI 54656-

Landholding Agency: Army  
Property Number: 219210340  
Status: Underutilized  
Comment: 5310 sq. ft., 2 story, possible  
asbestos, needs repair, selected period



Comment: 2350 sq. ft., 1 story, possible asbestos, needs repair, selected periods reserved for military/training exercises, most recent use—mess hall.



Bldg. 438, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210363  
Status: Underutilized  
Comment: 2500 sq. ft., 1 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—mess hall.

Bldg. 439, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210364  
Status: Underutilized  
Comment: 2350 sq. ft., 1 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—mess hall.

Bldg. 221, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210365  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 222, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210366  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 232, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210367  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 233, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210368  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 234, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210369  
Status: Underutilized  
Comment: 2682 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 240, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210370

Status: Underutilized  
Comment: 1750 sq. ft., 1 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office.

Bldg. 321, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210371  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 333, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210372  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 401, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210373  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 411, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210374  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 421, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210375  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 422, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210376  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 432, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210377  
Status: Underutilized  
Comment: 2750 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 433, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210378  
Status: Underutilized  
Comment: 3250 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 434, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210379  
Status: Underutilized  
Comment: 2682 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 443, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210380  
Status: Underutilized  
Comment: 2750 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

Bldg. 444, Fort McCoy  
U.S. Highway 21  
Ft. McCoy Co: Monroe WI 54656-  
Landholding Agency: Army  
Property Number: 219210381  
Status: Underutilized  
Comment: 2682 sq. ft., 2 story, possible  
asbestos, needs repair, selected periods  
reserved for military/training exercises,  
most recent use—office/storage.

#### Suitable/Unavailable Properties

##### Land (by State)

Oklahoma  
Parcel No. 54/GSA No. 6  
Lake Texoma Co: Marshall OK 73439-  
Location: Section 17, 3½ miles north of Little  
City, OK  
Landholding Agency: GSA  
Property Number: 549210007  
Status: Excess  
Comment: 5.05 acres, potential utilities, most  
recent use—low density recreation.  
GSA Number: 7-D-OK-0507-H  
Parcel No. 63/GSA No. 8  
Lake Texoma Co: Marshall OK 73439-  
Location: Section 19, 3½ miles southwest of  
Cumberland, OK  
Landholding Agency: GSA  
Property Number: 549210008  
Status: Excess  
Comment: 40.32 acres, potential utilities, most  
recent use—low density recreation.  
GSA Number: 7-D-OK-0507-H  
Parcel No. 66/GSA No. 9  
Lake Texoma Co: Marshall OK 73439-  
Location: Sections 12 and 13, 2½ miles  
southwest of Cumberland, OK  
Landholding Agency: GSA  
Property Number: 549210009  
Status: Excess  
Comment: 14.05 acres, potential utilities, most  
recent use—low density recreation/natural  
gas well and pipelines.



GSA Number: 7-D-OK-0507-H  
 Parcel No. 78/GSA No. 11  
 Lake Texoma Co: Marshall OK 73439-  
 Location: Section 24, 1 mile east of McBride,  
 OK  
 Landholding Agency: GSA  
 Property Number: 549210010  
 Status: Excess  
 Comment: 30.28 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H  
 Parcel No. 86/GSA No. 12  
 Lake Texoma Co: Marshall OK 73439-  
 Location: Section 1824, 3½ miles south of  
 Kingston, OK  
 Landholding Agency: GSA  
 Property Number: 549210011  
 Status: Excess  
 Comment: 13 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H  
 Parcel No. 125/GSA No. 14  
 Lake Texoma Co: Marshall OK 73439-  
 Location: Section 17  
 Landholding Agency: GSA  
 Property Number: 549210012  
 Status: Excess  
 Comment: 11.24 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H  
 Parcel No. 150/GSA No. 15  
 Lake Texoma Co: Marshall OK 73439-  
 Location: Section 8  
 Landholding Agency: GSA  
 Property Number: 549210013  
 Status: Excess  
 Comment: 12.64 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H  
 Parcel No. 164/GSA No. 16  
 Lake Texoma Co: Love OK 73441-  
 Location: Section 3  
 Landholding Agency: GSA  
 Property Number: 549210014  
 Status: Excess  
 Comment: 40.20 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H  
 Parcel No. 165/GSA No. 17  
 Lake Texoma Co: Love OK 73441-  
 Location: Section 3  
 Landholding Agency: GSA  
 Property Number: 549210015  
 Status: Excess  
 Comment: 32.62 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H  
 Parcel No. 165/GSA No. 18  
 Lake Texoma Co: Love OK 73441-  
 Location: Section 10  
 Landholding Agency: GSA  
 Property Number: 549210016  
 Status: Excess  
 Comment: 62.61 acres, potential utilities, most  
 recent use—low density recreation.  
 GSA Number: 7-D-OK-0507-H

#### Suitable/To Be Excessed

##### Land (by State)

##### Tennessee

Cates Casting Field  
 Mississippi River and Tributaries Project  
 Hwy. 22

Tiptonville Co: Lake TN 38079-  
 Landholding Agency: COE  
 Property Number: 319210010  
 Status: Unutilized  
 Comment: 57.0 acres, remote area, subject to  
 periodic flooding.  
 Loading Site  
 Cates Casting Field  
 Mississippi River and Tributaries Project  
 Tiptonville Co: Lake TN 38079-  
 Landholding Agency: COE  
 Property Number: 319210011  
 Status: Unutilized  
 Comment: 8.3 acres, remote area, subject to  
 periodic flooding.

#### Unsuitable Properties

##### Buildings (by State)

##### California

Naval Reserve Cntr.—# N62117  
 3100 Monte Diablo Avenue  
 Stockton Co: San Joaquin CA 95203-  
 Landholding Agency: GSA  
 Property Number: 549210021  
 Status: Excess  
 Reason: Within airport runway clear zone,  
 Other  
 Comment: Extensive deterioration  
 GSA Number: 9-N-CA-1305

#### Office of Assistant Secretary for Housing—Federal Housing Commissioner

[Docket Nos. N-92-3385; FR 3149-N-02,  
 and N-92-3386; FR 3150-N-02]

#### Fund Availability (NOFA) for Supportive Housing for the Elderly (FR 3149) and Supportive Housing for Persons With Disabilities (FR 3150)

**AGENCY:** Office of Assistant Secretary  
 for Housing—Federal Housing  
 Commissioner, HUD.

**ACTION:** Notice of extension of deadline  
 for applications.

**SUMMARY:** This Notice announces that  
 the previously published deadline date  
 of June 3, 1992 for the filing of  
 applications for participation in the  
 Supportive Housing for the Elderly and  
 the Supportive Housing for Persons with  
 Disabilities Programs has been extended  
 to June 24, 1992. The purpose of this  
 extension is to afford extra time to  
 applicants to compensate for the  
 Department's own delays in laying the  
 groundwork for the application process.

**DATES:** The new deadline for  
 applications in response to both the  
 Supportive Housing for the Elderly and  
 the Supportive Housing for Persons with  
 Disabilities funding announcements,  
 published on March 6, 1992 at 57 FR 8218  
 and 8206, respectively, will be June 24,  
 1992.

**ADDRESSES:** Applications must be  
 delivered to the HUD Field Office for the  
 applicant's jurisdiction. A listing of HUD  
 Field Offices, their addresses and  
 telephone numbers (including TDD  
 telephone numbers) was included as an  
 appendix to each of the Notices of  
 Funding Availability (NOFAs) published  
 on March 6, 1992. HUD will date and  
 time stamp incoming applications to  
 evidence timely receipt, and upon  
 request, provide the applicant with an  
 acknowledgement of receipt.  
 Applications submitted by facsimile are  
 not acceptable.

**FOR FURTHER INFORMATION CONTACT:**  
 The HUD Field Office for the applicant's  
 jurisdiction.

**SUPPLEMENTARY INFORMATION:** Notices  
 of Fund Availability (NOFAs) for the  
 Supportive Housing for the Elderly and  
 the Supportive Housing for Persons with  
 Disabilities programs for FY 1992 were  
 published on March 6, 1992 (57 FR 8218  
 (Elderly) and 57 FR 8206 (Persons with  
 Disabilities.) These NOFAs each  
 announced a deadline date for receipt of  
 applications in the appropriate HUD  
 Field Office of June 3, 1992.

Today's notice announces an  
 extension of the application deadline  
 date to June 24, 1992. The deadline is  
 being extended because the Department  
 has encountered delays in getting the  
 necessary advertising funds to the HUD  
 Regional Offices, so as to permit  
 appropriate advertising in the local  
 press, and in getting instructions to the  
 HUD Field Offices necessary for the  
 conduct of timely workshops with  
 prospective applicants for assistance.

The extension of the deadline will  
 provide applicants with needed  
 additional time, while leaving the  
 Department with sufficient time to  
 evaluate incoming applications and  
 make selection announcements before  
 the end of September 1992.

All of the information concerning the  
 application process published in HUD's  
 March 6, 1992 documents remains  
 applicable, and should be consulted by  
 prospective applicants for assistance  
 under these programs.

**Authority:** 12 U.S.C. 1701q; 42 U.S.C.  
 3535(d).

Dated: April 6, 1992.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 92-8316 Filed 4-9-92; 8:45 am]

BILLING CODE 4210-27-M



# Offices of the Assistant Secretary for Public and Indian Housing

## Assistant Secretary for Fair Housing and Equal Opportunity

[Docket No. D-92-985; FR 3258-D-01]

### Redelegation of Authority From Assistant Secretaries to Regional Administrators Under Section 504 of the Rehabilitation Act of 1973

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing and Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

**ACTION:** Notice of redelegation of authority.

**SUMMARY:** This notice redelegates authority to grant time extensions to Public Housing Agencies and Indian Housing Authorities to complete structural changes, to comply with Department of Housing and Urban Development (HUD) regulations at 24 CFR 8.25(c) implementing section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794 *et seq.*); the Act prohibits discrimination based on handicap in programs and activities receiving Federal financial assistance from HUD. This notice redelegates authority to grant extensions from the Assistant Secretary for Public and Indian Housing and from the Assistant Secretary for Fair Housing and Equal Opportunity to the HUD Regional Administrators.

**EFFECTIVE DATE:** April 6, 1992.

**FOR FURTHER INFORMATION CONTACT:** William C. Thorson, Director, Maintenance and Supply Division, Office of Construction, Rehabilitation and Management, Office of Public and Indian Housing, telephone (202) 708-4703, or Robert L. Walker, Director, HUD Program Investigations, Office of Investigations, Office of Fair Housing and Equal Opportunity, telephone (202) 708-0404, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:** HUD regulations at 24 CFR 8.25(c) require each Public Housing Agency (PHA) and Indian Housing Authority (IHA) to assess the need for accessible dwelling units within its jurisdictional area. If the assessment shows no need for additional accessible units, the PHA or IHA is not required to initiate action to alter existing housing facilities. Where the assessment demonstrates a need for more accessible units, the PHA or IHA must develop a transition plan to

achieve the necessary structural changes. The PHA or IHA must complete needed structural changes not later than July 11, 1992.

Section 8.25(c) also provides for two extensions of the 1992 deadline. The Assistant Secretaries for Public and Indian Housing and Fair Housing and Equal Opportunity may, on a case-by-case basis, extend the July 11, 1992 deadline, based on a determination that compliance would impose undue financial and administrative burdens; such extensions may not exceed two years—until July 11, 1994. The Deputy Secretary or the Secretary may extend the 1994 deadline further in extraordinary circumstances, for a period not to exceed one year—until July 11, 1995.

To facilitate timely approval of extensions, the Assistant Secretaries for Public and Indian Housing and Fair Housing and Equal Opportunity are redelegating their joint authority to Regional Administrators to allow Regional Administrators to grant extensions of the July 11, 1992 deadline for two years on a case-by-case basis. The authority of the Deputy Secretary or the Secretary to extend the 1994 deadline further in extraordinary circumstances, for a period not to exceed one year—until July 11, 1995, is not redelegated.

Accordingly, the Assistant Secretaries for Public and Indian Housing and Fair Housing Equal Opportunity redelegate the following authority:

#### Section A. Authority Redelegated

The Assistant Secretaries for Public and Indian Housing and Fair Housing and Equal Opportunity redelegate to the Regional Administrators the power and authority under HUD regulations at 24 CFR 8.25(c), to extend the July 11, 1992 deadline for a period not to exceed two years, to July 11, 1994, for Public Housing Agencies and Indian Housing Authorities to complete structural changes for additional accessible units, upon a finding that, on a case-by-case determination, compliance by July 11, 1992 would impose undue financial and administrative burdens on the operation of the recipient's public housing and multifamily Indian housing program.

#### Section B. No Further Redelegation

The authority granted to the Regional Administrators under this redelegation may not be further redelegated pursuant to this redelegation.

**Authority:** Sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: April 6, 1992.

Joseph G. Schiff,  
Assistant Secretary for Public and Indian Housing.

Gordon H. Mansfield,  
Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 92-8318 Filed 4-9-92; 8:45 am]

BILLING CODES 4210-33-M, 4210-28-M

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[CO-920-02-4120-14; COC 53510]

#### Notice of Public Hearing and Request for Comments on Environmental Assessment, Maximum Economic Recovery Report, Fair Market Value, and State Highway 133 Right-of-Way Coal Unsuitability Exception; Application for Competitive Coal Lease COC 53510; Colorado

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public hearing.

**SUMMARY:** Bureau of Land Management, Colorado State Office, Lakewood, Colorado, hereby gives notice that a public hearing will be held to receive comments on the environmental assessment, maximum economic recovery, fair market value of federal coal to be offered. The public hearing will also be open to receive comments on interests that might be affected by an exception to coal unsuitability Criterion No. 3 for lands under State Highway 133 right-of-way. An application for coal lease was filed by Somerset Mining Company requesting the Bureau of Land Management offer for competitive lease 1174.04 acres of Federal coal in Gunnison County, Colorado. An additional 165.52 acres of coal has been added in order to lease all of the recoverable coal in the area.

**DATES:** The public hearing will be held at 7 p.m., April 27, 1992. Written comments should be received no later than May 11, 1992.

**ADDRESSES:** The public hearing will be held in the Paonia Town Hall, Paonia Community Center Room, 214 Grand Avenue, Paonia, Colorado. Written comments should be addressed to the Bureau of Land Management, Uncompahgre Basin Resource Area Office, 2505 South Townsend Avenue, Montrose, Colorado 81401.

**FOR FURTHER INFORMATION CONTACT:** Allan Belt, Area Manager, Uncompahgre Basin Resource Area Office at the



address above, or by telephone at (303) 294-7791.

**SUPPLEMENTARY INFORMATION:** Bureau of Land Management, Colorado State Office, Lakewood, Colorado, hereby gives notice that a public hearing will be held on April 27, 1992, at 7 p.m., in the Paonia Town Hall, 214 Grand Avenue, Paonia, Colorado.

An application for coal lease was filed by Somerset Mining Company requesting the Bureau of Land Management offer for competitive lease Federal coal in the lands outside established coal production regions described as:

T. 13 S., R. 90 W., 6th P.M.

sec. 1, lots 14 to 19, inclusive;

sec. 2, lots 13 to 20, inclusive;

sec. 3, lots 13, 14, 17, and 18;

sec. 10, lots 1, 2, and NE $\frac{1}{4}$ SE $\frac{1}{4}$ ;

sec. 11, lots 1 to 8, inclusive;

sec. 12, lots 2 to 4, inclusive, SW $\frac{1}{4}$ NW $\frac{1}{4}$ , and those portions of SW $\frac{1}{4}$ NE $\frac{1}{4}$  and SE $\frac{1}{4}$ NW $\frac{1}{4}$  lying north of the North Fork of the Gunnison River, containing 1339.56 acres.

The coal resource to be offered is limited to coal recoverable by underground mining methods.

The purpose of the hearing is to obtain public comments on the environmental assessment and on the following items:

(1) The method of mining to be employed to obtain maximum economic recovery of the coal,

(2) The impact that mining the coal in the proposed leasehold may have on the area,

(3) The methods of determining the fair market value of the coal to be offered, and

(4) An assessment of Criterion No. 3 regarding underground mining within 100 feet of the outside line of the right-of-way for State Highway 133.

Written requests to testify orally at the April 27, 1992, public hearing should be received at the Uncompahgre Basin Resource Area Office prior to the close of business April 27, 1992. Those who indicate they wish to testify when they register at the hearing may have an opportunity if time is available.

In addition, the public is invited to submit written comments concerning the fair market value and maximum economic recovery of the coal resource. Public comments will be utilized in establishing fair market value for the coal resource in the described lands. Comments should address specific factors related to fair market value including, but not limited to:

1. The quality and quantity of the coal resource.

2. The price that the mined coal would bring in the market place.

3. The cost of producing the coal.

4. The interest rate at which anticipated income streams would be discounted.

5. Depreciation and other accounting factors.

6. The mining method or methods which would achieve maximum economic recovery of the coal.

7. Documented information on the terms and conditions of recent and similar coal land transactions in the lease sale area, and

8. Any comparable sales data of similar coal lands.

Should any information submitted as comments be considered to be proprietary by the commenter, the information should be labeled as such and stated in the first page of the submission. Written comments on the environmental assessment, maximum economic recovery, and fair market value should be sent to the Uncompahgre Basin Resource Area Office at the above address prior to close of business on May 11, 1992.

The public may also submit written comments on whether interests of the public or landowners would be affected by underground mining within 100 feet of the outside line of the right-of-way for State Highway 133. If such interests are protected, an exception to unsuitability Criterion No. 3 may be made under 43 CFR 3461.5(c)(2)(iii), after public notice and hearing.

Substantive comments, whether written or oral, will receive equal consideration prior to any lease offering.

The Draft Environmental Assessment and Maximum Economic Recovery Report are available from the Uncompahgre Basin Resource Area office upon request.

A copy of the Draft Environmental Assessment, the Maximum Economic Recovery Report, the case file, and the comments submitted by the public, except those portions identified as proprietary by the commenter and meeting exemptions stated in the Freedom of Information Act, will be available for public inspection at the Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado.

Dated: April 6, 1992.

Richard D. Tate,

Chief, Mining Law and Solid Minerals Adjudication Section.

[FR Doc. 92-8293 Filed 4-9-92; 8:45 am]

BILLING CODE 4310-JB-M

[NV020-4320-02]

### Winnemucca District Grazing Advisory Board Meeting

**SUMMARY:** Notice is hereby given in accordance with Public Law 92-463 that a meeting of the Winnemucca District Advisory Council will be held on Thursday, May 21, 1992. The meeting will be from 10 a.m. to 3 p.m. in the conference room of the Bureau of Land Management Office at 705 East 4th Street, Winnemucca, Nevada 89445.

The agenda for the meeting will include:

1. Update of the Black Rock/High Rock NCA Proposal.

2. Pine Forest Recreation Management Plan.

The meeting is open to the public. Interested persons may make oral statements to the council at 2 p.m. or file written statements for the council's consideration. Anyone wishing to make an oral statement must notify the District Manager by May 15, 1992. Depending on the number of persons wishing to make oral statements, a per person time limit may be established by the District Manager.

Summary minutes of the Council meeting will be maintained in the District Office and will be available for public inspection, (during regular business hours) within 30 days following the meeting.

Dated: April 3, 1992.

Ron Wenker,

District Manager.

[FR Doc. 92-8265 Filed 4-9-92; 8:45 am]

BILLING CODE 4310-HC-M

[ID-010-02-4212-13; IDI-27620]

### Notice of Realty Action—IDI-27620; Exchange of Public and Private Lands in Ada County, Idaho

**SUMMARY:** The following described public lands have been determined to be suitable for disposal by exchange under Sec. 206 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1716):

Boise Meridian

T. 2 N., R. 1 E.,

sec. 13, SE $\frac{1}{4}$ NE $\frac{1}{4}$ ;

Containing 40 acres, more or less.

In exchange for the above described public lands, the BLM proposes to acquire the following described private lands from Thomas T. Nicholson:

Boise Meridian

T. 2 N., R. 2 E.,

sec. 20, SW $\frac{1}{4}$ SE $\frac{1}{4}$ ;

Containing 40 acres, more or less.



The purpose of this exchange is to dispose of a parcel of public land that possesses very little resource value and that is difficult and uneconomic to manage in exchange for a parcel of private land that aids in blocking up public lands and provides legal access to public lands for recreation purposes. The public interest will be well served by the completion of this exchange.

The values of the lands to be exchanged are equal.

**DATES:** For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager at the address shown below.

**ADDRESSES:** Comments should be sent to the District Manager, Bureau of Land Management, Boise District, 3948 Development Avenue, Boise, Idaho 83705. Objections to this proposal will be reviewed by the State Director, who may sustain, modify, or vacate this realty action. In the absence of any adverse comments, this realty action will become the final determination of the Department of Interior.

**FOR FURTHER INFORMATION CONTACT:** John Sullivan, Bruneau Resource Area Realty Specialist at (208) 384-3338. The Environmental Assessment is available for review at the above address.

**SUPPLEMENTARY INFORMATION:** Publication of this notice in the **Federal Register** segregates the public lands from operation of the public land laws and mining laws, but not the mineral leasing laws. The segregative effect will end upon issuance of patent or two (2) years from the date of publication, whichever occurs first.

Lands to be transferred from the United States will be subject to the reservation to the United States of a right-of-way for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

Dated: March 31, 1992.

Rodger E. Schmitt,

Associate District Manager.

[FR Doc. 92-8266 Filed 4-9-92; 8:45 am]

BILLING CODE 4310-GG-M

[ID-060-02-4212-11; IDI-27169]

# **Realty Action; Public Lands in Clearwater County; Idaho**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Recreation and Public Purposes Act classification.

**SUMMARY:** The following described public lands in Clearwater County, Idaho, have been examined and found suitable for classification for conveyance to the Idaho Water Resource Board (IWRB) under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq.):

Boise Meridian, Idaho

T. 37 N., R. 1 E.,

Sec. 34, Portion of Lot 6.

Containing 17 acres, more or less.

IWRB proposes to use the land for construction and operation of a hydroelectric power project that would use water from a conduit constructed by the Corps of Engineers to carry water from the Corps' Dworshak Reservoir on the North Fork Clearwater River to two Corps-built fish hatcheries downstream. The power project would be authorized under a license exemption by the Federal Energy Regulatory Commission (FERC). Only those lands within the above-described parcel required for project development would be conveyed.

This action is consistent with current BLM land use planning. The site is not considered to be of national significance and is physically suitable for hydroelectric power generation. The conduit and distribution tank on which the power plant is proposed to be built have been constructed on the subject public land under a right-of-way reservation (IDI-26993) issued by the Bureau of Land Management to the Corps of Engineers. The pipeline was installed to provide a water supply from Dworshak Dam to the Dworshak National Fish Hatchery and the new Clearwater Fish Hatchery located at the confluence of the North Fork and the Clearwater River. The Corps does not object to the installation of power generation facilities by IWRB, using the existing conduit and distribution tank, conditioned on their approval of the final design of the project.

**SUPPLEMENTARY INFORMATION:** FERC issued a Preliminary Permit to IWRB on July 25, 1991, securing IWRB's priority position prior to filing an application for exemption from licensing. Subsequently, two requests for rehearing have been filed with FERC; therefore, following this classification action, no action to convey the subject public lands to IWRB for hydroelectric power generation purposes would be taken prior to rehearing before the Commission that would uphold the initial decision in favor of IWRB.

The lands are currently withdrawn by FERC for hydropower purposes: Power

Project No. 10819 (IWRB) and Power Project No. 10830 (Nez Perce Tribe). This classification action is not in conflict with FERC's withdrawals and FERC has no objection to this classification action, provided patent would contain a section 24 reservation under the Federal Power Act.

When issued, the patent will be subject to the following terms, conditions, and reservations:

1. Provisions of the Recreation and Public Purposes Act and to all applicable regulations of the Secretary of the Interior.

2. A right-of-way thereon for ditches and canals constructed by the authority of the United States, Act of August 30, 1890 (43 USC 945).

3. All minerals shall be reserved to the United States. Such resources will not be subject to exploration, prospecting, mining and removal under applicable law.

4. A right-of-way reservation to the Corps of Engineers for road and pipeline purposes, issued under the Act of October 21, 1976.

5. A power reservation under section 24 of the Federal Power Act of June 10, 1920.

6. A reservation of right-of-way for public access and use by the people of the United States on a strip of land 20 feet wide within the Corps of Engineers' pipeline route and roadway along the North Fork Clearwater River.

Publication of this notice in the **Federal Register** segregates the public lands from all other forms of appropriation under the public land laws including the general mining laws and mineral leasing laws. A final determination of this proposed decision will be made upon completion of the environmental analysis which will include clearances for archaeology, and threatened and endangered plants and animals.

**FOR ADDITIONAL INFORMATION:** Contact Kay Miller at (208) 962-3245, or at the Cottonwood Resource Area Office, Rt. 3, Box 181, Cottonwood, Idaho 83522.

**DATES AND ADDRESSES:** For a period of 45 days from the date of publication of this notice, interested persons may submit comments regarding the proposed classification to the District Manager, Coeur d'Alene District Office, 1808 North Third Street, Coeur d'Alene, Idaho 83814. Any adverse comments will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, the classification will become effective 60 days from date of publication.



Dated: April 2, 1992.

Fritz U. Rennebaum,

District Manager.

[FR Doc. 92-8271 Filed 4-9-92; 8:45 am]

BILLING CODE 4310-GG-M

## National Park Service

### National Register of Historic Places; Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before March 28, 1992. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by April 27, 1992.

Carol D. Shull,

Chief of Registration, National Register.

## ALASKA

### Matanuska-Susitna Borough-Census Area

*Camp Regalvita*, Atop Curry Ridge, Mile 137.2, Parks Hwy., Talkeetna vicinity, 92000424

### Sitka Borough-Census Area

*Hanlon-Osbakken House*, 419 Lincoln St., Sitka, 92000404  
*Murray Apartments and Cottages*, 200, 204 and 206 Seward, Sitka, 92000402

## Arkansas

### Ashley County

*First United Methodist Church*, 204 S. Main, Hamburg, 92000388

## California

### Santa Cruz County

*Davenport Jail*, 1 Center St., Davenport, 92000422  
*Veterans Memorial Building*, 842-846 Front St., Santa Cruz, 92000423

### Sonoma County

*Sonoma Plaza (Boundary Increase)*, Area surrounding town plaza, Sonoma, 92000293

## Connecticut

### Hartford County

*Allen's Cider Mill*, 7 Mountain Rd., Granby, 92000389

*Hayes, Samuel II, House*, 67 Barndoor Hills Rd., Granby, 92000390

*West Granby Historic District*, Broad Hill, Hartland, W. Granby and Simsbury Rds. and Day St. S., Granby, 92000385

### Litchfield County

*Merritt Beach & Son Building*, 30 Bridge St., New Milford, 92000403

## Florida

### Indian River County

*Vero Theatre*, 2036 14th Ave., Vero Beach, 92000421

### Pinellas County

*Ingleside*, 333 S. Bayshore Blvd., Safety Harbor, 92000405

## GEORGIA

### Ben Hill County

*Fitzgerald Commercial Historic District*, Roughly bounded by Ocmulgee, Thomas, Magnolia and Lee Sts., Ben Hill, 92000383

### Emanuel County

*Coleman, James, House*, 323 N. Main St., Swainsboro, 92000384

## IDAHO

### Bonneville County

*Sealand, Carl S. and Lizzie, Farmstead (New Sweden and Riverview Farmsteads and Institutional Buildings MPS)*, W end St. John Rd., Idaho Falls, 92000414

### Boundary County

*North Side School (Public School Buildings in Idaho MPS)*, 218 W. Commanche, Bonners Ferry, 92000417

### Gem County

*Ola School (Public School Buildings in Idaho MPS)*, 5 Ola School Rd., Ola, 92000415

### Kootenai County

*Sherman Park Addition*, Bounded by Garden Ave., Hubbard St., Lakeshore Dr. and Park Dr., Coeur d'Alene, 92000418  
*Treaty Rock*, N. of I-90, NE. of Spokane R. Falls, Post Falls vicinity, 92000420

### Latah County

*Moscow High School (Public School Buildings in Idaho MPS)*, 410 3rd E., Moswod, 92000416

### Nez Perce County

*Thompson, Gaylord, House*, 1824 Seventeenth Ave., Lewiston, 92000419

### Twin Falls County

*Lincoln Street Electric Streetlights*, 105, 120, 147, 174, 189, 210, 217, 242, 275 and 290 Lincoln St., Twin Falls, 92000413

## IOWA

### Johnson County

*Rose Hill*, 1415 E. Davenport St., Iowa City, 92000425

### Monroe County

*Saint Patrick's Roman Catholic Church*, US 34 W. of Albia, Albia vicinity, 92000426

## KANSAS

### Lyon County

*Harris-Borman House*, 827 Mechanic, Emporia, 92000431  
*Keebler-Stone House*, 831 Constitution St., Emporia, 92000387

### Shawnee County

*Giles-Nellis House*, 915 SW. Munson, Topeka, 92000432

## MASSACHUSETTS

### Barnstable County

*Eldredge Public Library*, 564 Main St., Chatham, 92000430

## NORTH DAKOTA

### Grand Forks County

*North Dakota Mill and Elevator*, 1823 Mill Rd., Grand Forks, 92000433

### Morton County

*Fort Abraham Lincoln State Park District*, Along ND 1806 at jct. of Missouri and Heart Rivers, Mandan, 92000434

## PENNSYLVANIA

### Adams County

*Zeigler, John, Farm House*, 1281 Mountain Rd., Latimore Township, York Springs, 92000395

### Berks County

*Gehman, John, Farm (Farms in Berks County MPS)*, Township Rd. N of Harlem, Hereford Township, Seisholtzville 92000398  
*Ridgewood Farm (Farms in Berks County MPS)*, Jct. of PA 724 and I-176, Cumru Township, Seyfert, 92000399

### Bradford County

*Towanda Historic District*, Roughly bounded by Elizabeth, Fourth and Kingsbury Sts. and the Susquehanna R., Towanda, 92000394

### Bucks County

*Slate Hill Cemetery*, Jct. of Yardley—Morrisville Rd. and Mahlon Dr., Lower Makefield Township, Morrisville vicinity, 92000397

### Cambria County

*Berwind—White Mine 40 Historic District*, Roughly bounded by the boney pile, Eureka No. 40 mine site, Scalp Level Borough line and Berwind—White Farmstead, Scalp Level, 92000392

### Chester County

*Birchrunville Historic District*, Jct. of Flowing Springs Rd. and Schoolhouse Ln., West Vincent Township, Birchrunville, 92000401

### Fayette County

*Brown—Moore Blacksmith Shop*, 0.1 mi. W of PA 4020, Luzerne Township, Merrittstown, 92000393

### Huntingdon County

*Robertsdale Historic District (Industrial Resources of Huntingdon County MPS)*, Roughly bounded by USGS 1840 contour line, S. Main, Wood, Lincoln, Cliff and Cherry Sts., Wood Township, Robertsdale, 92000391

### Indiana County

*Salisbury Historic District*, Roughly, W of Plum and Walnut Alleys to Kiskiminetas R., Saltsburg, 92000386

### Lehigh County

*Schlicher, George F., Hotel*, 105-107 S. Main St., Alburtis, 92000396



**Philadelphia County**

*St. Anthony de Padua Parish School*, 2317-2333 Carpenter St., Philadelphia, 92000400

**TENNESSEE****Anderson County**

*Bear Creek Road Checking Station (Oak Ridge MPS)*, Jct. of S. Illinois Ave. and Bear Creek Rd., Oak Ridge, 92000411

*Bethel Valley Road Checking Station (Oak Ridge MPS)*, Jct. of Bethel Valley and Scarboro Rds., Oak Ridge, 92000410

*Freels Cabin (Oak Ridge MPS)*, Freels Bend Rd., Oak Ridge, 92000407

**Dyer County**

*Gordon—Oak Streets Historic District (Dyersburg MPS)*, 107-302 Gordon and 114-305 Oak Sts., and W side 711-731 Sampson Ave., Dyersburg, 92000428

*Troy Avenue Historic District (Dyersburg MPS)*, 827-1445 Troy Ave., W side, Dyersburg, 92000429

**Roane County**

*Jones, George, Memorial Baptist Church (Oak Ridge MPS)*, Blair Rd., Oak Ridge, 92000408

*New Bethel Baptist Church (Oak Ridge MPS)*, Bethel Valley Rd., Oak Ridge, 92000409

*Oak Ridge Turnpike Checking Station (Oak Ridge MPS)*, Oak Ridge Tpk., Oak Ridge, 92000412

**Tipton County**

*South Main Street Historic District*, Roughly bounded by S. Main St., Sherrod Ave., S. Maple St. and Sanford and Lauderdale Aves., Covington, 92000427

**WISCONSIN****Dane County**

*Mazomanie Downtown Historic District*, 1-118 Brodhead, 2-46 Hudson, 37-105 Crescent and 113 E. Exchange Sts., Mazomanie, 92000406

**INTERSTATE COMMERCE COMMISSION****Intent to Engage in Compensated Intercorporate Hauling Operations**

April 7, 1992.

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

1. Parent corporation and address of principal office:

Brunswick Corporation, a Delaware Corporation, One Brunswick Plaza, Skokie, Illinois 60077.

2. Wholly owned subsidiaries which will participate in the operations:

Sea Ray Boats, Inc., a Tennessee Corporation.

Starcraft Power Boats Corporation, a Delaware Corporation.

1. Parent corporation and address of principal office:

North Cost Container Corp. (Ohio corporation), 8806 Crane Avenue, Cleveland, Ohio 44105.

2. Wholly owned subsidiary which will participate in the operations, and state of incorporation:

S.T.C Transportation, Inc. (Ohio corporation).

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-8307 Filed 4-9-92; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 32003]

**Burlington Northern Railroad Co.—Purchase Exemption—Soo Line Railroad Co.**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of exemption.

**SUMMARY:** Under 49 U.S.C. 10505, the Commission exempts from the prior approval requirements of 49 U.S.C. 11343, *et seq.*, Burlington Northern Railroad Company's purchase of a rail line presently owned by Soo Line Railroad Company. The line extends from Ortonville, MN (Mile Post 600.7) to Appleton, MN (Mile Post 578.93), a distance of approximately 21.8 miles. The exemption is subject to standard employee protective conditions.

**DATES:** This exemption will be effective on May 10, 1992. Petitions to stay must be filed by April 20, 1992, and petitions for reconsideration must be filed by April 30, 1992.

**ADDRESSES:** Send pleadings referring to Finance Docket No. 32003 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

(2) Petitioners' representative:

Edmund W. Burke, 3800 Continental Plaza, 777 Main Street, Fort Worth, TX 76102.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 927-5660. (TDD for hearing impaired: (202) 927-5721.)

**SUPPLEMENTARY INFORMATION:**

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. (Assistant for the hearing impaired is available through TDD services (202) 927-5721.)

Decided: April 2, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 92-8308 Filed 4-9-92; 8:45 am]

BILLING CODE 7035-01-M

**DEPARTMENT OF JUSTICE****Bureau of Prisons****Intent to Prepare a Draft Environmental Impact Statement (DEIS) for the Construction of a Federal Correctional Institution in Edgefield, Edgefield County, SC**

**AGENCY:** Bureau of Prisons, Justice.

**ACTION:** Notice of Intent to prepare a Draft Environmental Impact Statement (DEIS).

**SUMMARY:****Proposed Action**

The U.S. Department of Justice, Federal Bureau of Prisons has determined that a new Federal Correctional Institution (FCI) is needed in its system. A number of options in and around Edgefield, South Carolina will be evaluated. The proposal calls for the construction of a 1600 bed facility to house individuals with a low security level.

Additionally, the site would be used for road access, inmate housing, administration, programs and services, parking and support facilities. Enclosed and secure exercise areas would be included in the facility.

In the process of evaluating the tract of land, several aspects will receive a detailed examination including utilities, traffic patterns, noise levels, visual intrusion, threatened and endangered species, cultural resources, and socio-economic impacts.

**Alternatives**

In developing the DEIS, the options of no action and alternative sites for the proposed facility will be fully and thoroughly examined.

**Scoping Process**

During the preparation of the DEIS, there will be numerous opportunities for public involvement in order to determine the issues to be examined. A scoping meeting will be held at a location convenient to the citizens of Edgefield County. The meeting will be well publicized and will be held at a time which will make it possible for the public and interested agencies or organizations to attend. In addition, a



number of informal meetings have already been held and will be continued by representatives of the Bureau of Prisons with interested community leaders, officials, and citizens.

#### DEIS Preparation

Public notice will be given concerning the availability of the DEIS for public review and comment.

#### Address

Questions concerning the proposed action and the DEIS can be answered by: Natalie A. Landy, Site Selection Specialist, Federal Bureau of Prisons, 320 First Street, NW., Washington, DC 20534, (202) 307-0817.

Dated: April 8, 1992.

Patricia K. Sledge,

Chief, Site Selection and Environmental Review.

[FR Doc. 92-8297 Filed 4-9-92; 8:45 am]

BILLING CODE 4410-05-M

## DEPARTMENT OF LABOR

### Employment and Training Administration

[TA-W-26,281]

#### Shell Oil Co. et al.; Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

In the matter of Shell Offshore, Incorporated, New Orleans, Louisiana and operating at the following subject locations: TA-W-26,281A, Venice, Louisiana; TA-W-26,281B, Harvey, Louisiana; TA-W-26,281C, Morgan City, Louisiana; TA-W-26,281D, Fourchon, Louisiana; TA-W-26,281E, Galveston, Texas; TA-W-26,305, Shell Oil Company, Administration, Houston, Texas and operating in the following states and locations: TA-W-26,305A New York, TA-W-26,305B New Jersey, TA-W-26,305C Illinois, TA-W-26,305D Washington, TA-W-26,305E District of Columbia; TA-W-26,307 Shell Oil Company Development, Houston, Texas; TA-W-26,309 Shell Oil Company Products Organization, Houston, Texas; and TA-W-26,310 Shell Oil Company, Shell Western E&P, Incorporated, Headquartered in Houston, Texas and operating at various locations in the following states: TA-W-26,310A Alaska, TA-W-26,310B California, TA-W-26,310C Colorado, TA-W-26,310D Louisiana, TA-W-26,310E Michigan, TA-W-26,310F Montana, TA-W-26,310G Oklahoma, TA-W-26,310H Texas (except Houston).

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance on December 13, 1991, applicable to workers of the Shell Oil Company's Administration,

Development and Products Organization in Houston, Texas; Shell Offshore, Inc., in New Orleans, Louisiana and Shell Western E&P in Houston, Texas and operating at the above cited States. The Notice was published in the Federal Register on December 27, 1991 (56 FR 67104). The Notice was subsequently amended on January 17, 1992 to include additional States and the District of Columbia under petition TA-W-26,305. The amendment was published in the Federal Register of January 31, 1992 (57 FR 3800).

At the request of the State Agency the Department reviewed its notice of determinations. New information from the company reveals that worker separations occurred in other Louisiana locations which supported the offshore drilling of Shell Offshore, Inc.

The intent of the Department's certification is to include all workers of who were affected by increased imports of crude oil and natural gas.

The amended notice applicable to TA-W-26,281 is hereby issued as follows:

All workers of Shell Oil Company, Shell Offshore, Inc., New Orleans, Louisiana; Venice, Louisiana; Harvey, Louisiana; Morgan City, Louisiana; Fourchon, Louisiana; and Galveston, Texas (TA-W-26,281A-F) and Shell Oil Company Administration and E&P, Houston, Texas and operating in the following States and locations, New York, New Jersey, Illinois, Washington and the District of Columbia (TA-W-26,305A-E) and Shell Oil Company, Development, Houston, Texas (TA-W-26,307) and Shell Oil Company, Shell Western E&P, Inc., Houston, Texas and operating in Alaska, California, Colorado, Louisiana, Michigan, Montana, Oklahoma and Texas except Houston (TA-W-26,310) who became totally or partially separated from employment on or after September 15, 1991 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

I further determine that all workers at Shell Products Organization, headquartered in Houston, Texas (TA-W-26,309) are denied eligibility to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 2nd day of April 1992.

Marvin M. Fooks,

Director, Office of Trade Adjustment Assistance.

[FR Doc. 92-8338 Filed 4-9-92; 8:45 am]

BILLING CODE 4510-30-M

## Employment Standards Administration

### Wage and Hour Division; Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the Federal Register, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the



applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue NW., room S-3014, Washington, DC 20210.

#### Supersedeas Decisions to General Wage Determination Decisions

The numbers of the decisions being superseded and their date of notice in the *Federal Register* are listed with each State. Supersedeas decision numbers are in parentheses following the number of the decisions being superseded.

#### Nevada:

NV91-3 (Feb. 22, 1991) p. All.  
(NV91-9).

#### Utah:

UT91-10 (Feb. 22, 1991) p. All.  
(UT91-20).  
UT91-14 (Feb. 22, 1991) p. All.  
(UT91-20).  
UT91-16 (Feb. 22, 1991) p. All.  
(UT91-20).

#### Modifications to General Wage Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the *Federal Register* are in parentheses following the decisions being modified.

#### Volume I

#### Georgia:

GA91-3 (Feb. 22, 1991) p. All.

CA91-31 (Feb. 22, 1991) p. All.

#### New Jersey:

NJ91-2 (Feb. 22, 1991) p. 701, pp.  
707-708, pp.  
718-720.

#### Pennsylvania:

PA91-15 (Feb. 22, 1991) p. All.  
PA91-22 (Feb. 22, 1991) p. 1111, pp.  
1112, 1115,  
p. 1117.

#### Volume II

#### Indiana:

IN91-3 (Feb. 22, 1991) p. 278, p. 280.  
IN91-6 (Feb. 22, 1991) p. 315, p. 316.

#### Kansas:

KS91-8 (Feb. 22, 1991) p. All.

#### Michigan:

MI91-1 (Feb. 22, 1991) p. 441, p. 443.  
MI91-2 (Feb. 22, 1991) p. 461, p. 463.

#### Volume III

#### California:

CA91-1 (Feb. 22, 1991) p. All.  
CA91-2 (Feb. 22, 1991) p. All.

#### Montana:

MT91-2 (Feb. 22, 1991) p. All.

#### Oregon:

OR91-1 (Feb. 22, 1991) p. All.

#### General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC this 6th day of April 1992.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 92-8229 Filed 4-9-92; 8:45 am]

BILLING CODE 4510-27-M

#### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 92-20; Exemption Application No. D-8862, et al.]

#### Grant of Individual Exemptions; Citizens Federal Bank, F.S.B., et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the *Federal Register* of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;



(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

**Citizens Federal Bank, F.S.B. (Citizens)  
Located in Dayton, Ohio**

[Prohibited Transaction Exemption 92-20;  
Exemption Application No. D-8862]

**Exemption**

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the sale by Citizens of its holding company's common stock to the Simplified Employee Pension Plans (SEPs) and Keogh Plans (Keoghs) for which Citizens serves as custodian, as part of an initial issue of such stock; and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to the sale by Citizens of its holding company's common stock to the individual retirement accounts (IRAs)<sup>1</sup> for which Citizens serves as custodian, as part of an initial issue of such stock, provided the SEPs, Keoghs and IRAs pay no more than the fair market value of the stock on the date of the sale. The exemption is also subject to the following conditions: (1) The decision to purchase the stock of the holding company will be made by IRA, SEP and Keogh customers as part of a range of investment choices, and Citizens has no discretion over such decision; (2) no fees or commissions will be paid by the purchasers with respect to the transaction; (3) no more than 25% of the assets of any IRA, Keogh or SEP will be invested in the stock in connection with the initial offering; and (4) the purchase price of the stock will be determined by independent appraisal, and must be approved by the Office of Thrift Supervision.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 8, 1992 at 57 FR 704.

Notice to Interested Persons: The applicant represents that it was unable to comply with the notice to interested persons requirement within the time frame stated in its application. However,

the applicant has represented that it notified all interested persons, in the manner agreed upon between the applicant and the Department, by February 25, 1992. Interested persons were informed that they had until March 26, 1992 to comment with respect to the proposed exemption. No comments were received by the Department.

For Further Information Contact: Gary H. Lefkowitz of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**Amgen Retirement and Savings Plan  
(the Plan) Located in Thousand Oaks,  
California**

[Prohibited Transaction Exemption 92-21;  
Exemption Application No. D-8891]

**Exemption**

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale by the Plan of its interest in a Guaranteed Income Contract (the GIC) of Mutual Benefit Life Insurance Company to Amgen, Inc., a party in interest with respect to the Plan, provided the following conditions are satisfied: (1) The sale is a one-time transaction for cash; (2) the Plan receives no less than the fair market value of the GIC at the time of the transaction; (3) the Plan's independent fiduciary, Security Pacific National Bank (SPNB) has determined that the sales price is not less than the current fair market value of the GIC; and (4) SPNB has determined that the transaction is appropriate for the Plan and in the best interests of the Plan and its participants and beneficiaries.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on February 11, 1992 at 57 FR 5011.

For Further Information Contact: Gary H. Lefkowitz of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**Equitable Life Assurance Society of the  
United States (Equitable) Located in  
New York, New York**

[Prohibited Transaction Exemption 92-22;  
Exemption Application Nos. D-8649, D-8659,  
and D-8660]

**Exemption**

The restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply

to: (1) The reallocation of certain shared real estate investment interests (the Interests) between Equitable and Equitable Variable Life Insurance Company's (EVLICO) General Account and Separate Account Nos. 143 and 174 (the Separate Accounts), single customer accounts established pursuant to a group annuity contract with the International Business Machines (IBM) Retirement Plan (the Plan); (2) the reallocation of the Granite Run mortgage loan (the Granite Run Mortgage) from Equitable's General Account to Separate Account No. 174; and (3) the payments of cash from Equitable's General Account to Separate Account No. 143; provided that: (a) The transactions were on terms and conditions at least as favorable to the Plan as those between unrelated parties; (b) Equitable has not represented the Plan in any way with regard to the transactions; (c) the Plan retained Jackson-Cross to act as independent fiduciary with respect to the transactions; and (d) Jackson-Cross concluded that the transactions were in the best interests of the Plan.

Effective Date: This exemption will be effective December 27, 1990.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on February 11, 1992 at 57 FR 5012.

For Further Information Contact: Ms. Jean Anderson of the Department, telephone (202) 523-8971. (This is not a toll-free number.)

**Fluidyne Engineering Corporation  
Pension Trust (the Plan) Located in St.  
Paul, Minnesota**

[Prohibited Transaction Exemption 92-23;  
Exemption Application No. D-8770]

**Exemption**

The restriction of section 406 (a), (b)(1), and (b)(2) of the Act and the sanction resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to: (a) The loan of \$500,000 (the Loan) by the Plan to Fluidyne Engineering Corporation (the Employer), a party in interest with respect to the Plan; and (b) the personal guaranty by certain officers and shareholders of the Employer of fifty percent (50%) of the outstanding amount of the Loan provide that: (1) No more than 25 percent (25%) of the assets of the Plan are involved in the Loan; (2) the terms and conditions of the Loan are no less favorable to the Plan than those obtainable in an arm's length transaction involving an unrelated third

<sup>1</sup> Pursuant to 29 CFR 2510.3-2(d), there is no jurisdiction with respect to the IRAs under Title I of the Act. However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.



party; (3) the Loan will be secured, in part, by property (the Property) the value of which has been determined by a qualified independent appraiser; (4) the Plan's interest in the Property will be recorded as a first mortgage; (5) an independent fiduciary (the I/F), has reviewed and approved the terms of the Loan and will monitor compliance with such terms throughout the duration of the transactions; and (6) the Plan will incur no fees, commissions or other charges as a result of the transactions.

#### Written Comments

The Department received no requests for hearing and two written comments, one from the applicant and one from the I/F with respect to the notice of proposed exemption (the Notice). In its letter, the applicant informed the Department that it wished to correct certain information published in the Notice. Accordingly, the following information is incorporated into the granted exemption, as corrected: (a) In the heading of the Notice, the Plan is identified as being located in Minneapolis, Minnesota, which is the corporate headquarters of the Employer. As the Plan is administered by the First Trust National Association, located in St. Paul, Minnesota, the applicant represents that the Plan's location should be listed in the heading as St. Paul, Minnesota; (b) In paragraph #3 of the Notice, the address of the Employer is incorrectly listed as 623 Marquette Avenue, suite 735, Minneapolis, Minnesota. The Employer's correct address is 5900 Olson Memorial Highway, Minneapolis, Minnesota.

With its letter, the I/F submitted a revised copy of the guaranty agreement. It is represented that upon review and discussions with the guarantors, the I/F discovered a genuine misunderstanding existed as to several of the terms of the guaranty submitted in support of the application. In order to have the language of the guaranty coincide with that which has been agreed upon, the I/F made several changes in the guaranty which it represents are not inconsistent with the terms and conditions of the transaction as set forth in the Notice on December 12, 1991. The I/F represents that the terms of the guaranty continue to represent a document that was negotiated at arm's length. The I/F further represented that the transaction is adequately secured, even in the absence of the guaranty. Finally, the I/F has agreed that shareholders of the Employer, in addition to the officers of the Employer, can serve as guarantors.

After giving full consideration to the entire record, including the written comments, the Department has decided

to grant the exemption, as modified above.

All comments submitted to the Department are included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, are made available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, room N-5507, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For Further Information Contact: Angelena Le Blanc of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

**Combs & Associates Inc. Retirement Plan and Trust (the Pension Plan) and Combs & Associates Inc. Profit Sharing Plan and Trust (the P/S Plan; Collectively, the Plans) Located in Charlotte, NC.**

[Prohibited Transaction Exemption 92-24; Exemption Application Nos. D-8830 and D-8831]

#### Exemption

The restrictions of section 406 (a) and (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the cash sale by the Plans of certain parcels of unimproved real property (the Parcels) to Anthony R. Combs and his wife, Karen C. Combs, parties in interest with respect to the Plans; provided that the terms of the transaction are no less favorable to the Plans than those negotiated in similar transactions at arm's length with unrelated third parties; and provided further that the sales price is the greater of the total cost to the Plans of acquiring those Parcels or the fair market value of such Parcels on the date of the sale, as determined by an independent qualified appraiser.

#### Written Comments

The Department received no requests for hearing and one written comment from the applicants with respect to the notice of proposed exemption (the Notice). In that letter, the applicants informed the Department that they wished to correct certain typographical errors and other information published in the Notice. Accordingly, the following information is incorporated into the granted exemption, as corrected: (a) Paragraph number one of the Notice is amended to indicate that on June 30, 1991, the Pension Plan has assets of approximately \$256,739 (rather than

\$236,739) and that the value of the Parcels constitute approximately 15.04% (rather than 15.4%) of the assets of the Pension Plan; and (b) Paragraph number five of the Notice, as published, contains the sentence, "On March 15, 1989, upon advice of its counsel and the advice of its actuarial and employee benefit consulting firm, the Employer entered into three transactions." This sentence is amended to state that on March 15, 1989, upon advice of its actuarial and employee benefit consulting firm, Combs and Associates, Inc. (the Employer) entered into the three transactions described therein. It is further represented that the Employer did not request that its counsel render advice with respect to these three transactions nor did counsel for the Employer render any such advice.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on February 11, 1992, at 57 FR 5015.

For Further Information Contact: Angelena C. Le Blanc of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and



(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 7th day of April, 1992.

Ivan Strasfeld,

Director of Exemption Determinations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 92-8336 Filed 4-9-92; 8:45 am]

BILLING CODE 4510-29-M

[Application No. D-8358, et al.]

**Proposed Exemptions; Equitable Life Assurance Society of the United States, et al.**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, room N-5649, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Attention:

Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room on Pension and Welfare Benefits Administration, U.S. Department of Labor, room N-5507, 200 Constitution Avenue NW., Washington, DC 20210.

**Notice to Interested Persons**

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(5) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

**Equitable Life Assurance Society of the United States (Equitable) Located in New York, New York**

[Exemption Application No. D-8358]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to: (1) The reallocation of joint venture ownership interest in the One Market Plaza

Complex (the One Market Plaza Joint Venture) in San Francisco, California, from Equitable's general account to Separate Account No. 178, a newly-formed single customer separate account to be maintained by Equitable, under a group annuity contract, on behalf of the International Business Machines Corporation (IBM) Retirement Plan (the Plan); and (2) the lease by Separate Account No. 178 of 14,797 square feet of office space in One Market Plaza to Equitable's real estate investment management subsidiary, Equitable Real Estate Investment Management, Inc. (EREIM) for the period of time between March 30, 1990 through April 30, 1991, provided that: (a) The terms of the transactions were negotiated at arm's-length; (b) the transactions were initiated by the Plan based on its own review of investment needs; (c) the Plan retained Jackson-Cross to act as independent fiduciary with respect to the transactions; (d) Jackson-Cross concluded that the transactions were in the best interest of the Plan; and (e) the terms and conditions of the transactions were at least as favorable to the Plan as those between unrelated parties.

**EFFECTIVE DATE:** This exemption, if granted, will be effective March 30, 1990.

**Summary of Facts and Representations**

1. Equitable is a mutual life insurance company organized under the laws of the State of New York and subject to supervision and examination by the Superintendent of Insurance of the State of New York. It is the third largest life insurance company in the United States. Among the wide variety of insurance products and services it offers, Equitable provides funding, asset management and other services for several thousand employee benefit plans subject to the provisions of Title I of the Act.

Equitable maintains several pooled separate accounts in which pension, profit-sharing, and thrift plans participate. Equitable also has several single customer separate accounts and investment management accounts pursuant to which Equitable manages all or a portion of the assets of a number of large plans. Equitable's real estate investment management subsidiary, EREIM, provides real estate investment advisory services to Equitable and property management services with respect to certain properties held by Equitable accounts. EREIM provides real estate investment advisory services to Equitable with respect to the real property assets of Separate Account No. 143.



Equitable has substantial experience in managing real estate investments. Of the more than \$61 billion in total assets held by Equitable at year-end 1989, Equitable's General Account held \$12.2 billion in real estate mortgage loans and approximately \$4 billion in equity investments in real property and interests in real estate joint ventures. Additionally, more than \$6 billion of real property investments were held in Equitable's real estate separate accounts.

The Equitable Variable Life Insurance Company (EVLICO) is a wholly owned subsidiary of Equitable.<sup>1</sup> EVLICO sells variable life insurance policies through Equitable agents in 50 states, Puerto Rico, the Virgin Islands and the District of Columbia. As of December 31, 1990, EVLICO had approximately \$55 billion face amount of variable life insurance in force.

2. IBM and its subsidiaries and affiliates are the largest manufacturers of data processing equipment machines and systems in the world. As of December 31, 1989, IBM had total assets of \$78 billion. The total assets of the Plan were approximately \$22.9 billion as of December 31, 1989. Of this amount, \$2.1 billion (9.2 percent of total assets) were held in real estate investments. The named fiduciary of the Plan is the IBM Retirement Plans Committee (the IBM Committee). The IBM Committee is composed of three to five directors of IBM, a majority of whom are outside directors.

3. Equitable maintains five separate accounts on behalf of the Plan. Only one of these accounts, Separate Account No. 143, is the subject of this exemption application. As of December 31, 1989, the net asset value of Separate Account No. 143, which invests in office building complexes, was \$485,656,395 (23 percent of the total real estate investments of the Plan and 2.1 percent of the total assets of the Plan).

4. On October 3, 1988, the Department published an individual exemption, Prohibited Transaction Exemption (PTE) 88-92 (53 FR 38798), which exempts certain transactions which may occur as a result of the sharing of real estate investments among various accounts maintained by Equitable, including Equitable's General Account, and accounts maintained by Equitable in which employee benefit plans participate, provided that specified conditions are met. The shared investments held in Separate Account

No. 143 are held and administered in accordance with PTE 88-92.

On May 3, 1991, the Department published another individual exemption, PTE 91-26 (56 FR 20480), which exempts the transfer of certain interests in four parcels of real property from Equitable's General Account to Separate Account No. 143. Among the property interests transferred to Separate Account No. 143 pursuant to PTE 91-26, was a portion of Equitable's interest in the One Market Plaza Joint Venture.

5. As named fiduciary of the Plan, the IBM Committee decided that the One Market Plaza Joint Venture should be terminated and Equitable's remaining interest in the One Market Plaza Joint Venture should be reallocated to the Plan and transferred to a new separate account, Separate Account No. 178. Equitable's interest in the One Market Plaza Joint Venture was transferred to Separate Account No. 178 on March 30, 1990. Pursuant to the termination of the One Market Plaza Joint Venture, Equitable has no investment discretion with respect to Separate Account No. 178.<sup>2</sup>

The applicant represents that as a result of the termination of the One Market Plaza Joint Venture, the lease by Separate Account No. 143 of 14,797 square feet of office space in One Market Plaza to EREIM became a prohibited transaction on March 30, 1990.<sup>3</sup>

6. In connection with the original reallocation of One Market Plaza, on December 1, 1986, Equitable and the Plan executed an Investment Allocation Agreement (the Agreement) governing the terms of the One Market Plaza Joint Venture. The Agreement stipulated that if the Plan requested reallocation of any of the interests retained by Equitable's General Account, Equitable and the Plan (or the independent fiduciary acting on behalf of the Plan) would negotiate the terms of the proposed reallocation. In the event that agreement could not be reached through negotiation, the

<sup>2</sup> The applicant represents that the delegation of sole investment authority to the IBM Committee is consistent with section 4240(f) of the New York State Insurance Law. In addition, the New York State Superintendent of Insurance, in granting Equitable approval to reallocate the One Market Plaza Joint Venture, acknowledged the transfer of investment authority to the IBM Committee.

<sup>3</sup> The applicant represents that the One Market Plaza Joint Venture was a real estate operating company (REOC) within the meaning of the Department's "plan asset" regulation, 20 CFR 2510.3-101(e) and that One Market Plaza was not an asset of the Plan for purposes of the prohibited transaction provisions of the Act and the Code. The Department expresses no opinion herein as to whether One Market Plaza constituted an asset of the plan or whether the One Market Plaza Joint Venture was a REOC.

Agreement provided for the use of independent appraisers to determine the price to be paid for the reallocated interest.

Consistent with this provision, the Director of Real Estate and Alternative Investments for the Plan requested the reallocation of the interest retained by Equitable in One Market Plaza to the Plan in a letter dated December 28, 1989. The Plan requested the reallocation both in light of the favorable performance of the property and as part of an overall effort to consolidate its control over its real estate investments. The applicant represents that Equitable had no discretion with regard to the Plan's decision to enter into the transaction and that the terms of the transaction were the subject of arm's-length negotiations between Equitable and the Plan.

7. The Plan retained Jackson-Cross Company (Jackson-Cross) to act as independent fiduciary in connection with the termination of the One Market Plaza Joint Venture. Jackson-Cross is a Pennsylvania corporation engaged, directly and through its affiliates, in the business of commercial real estate consulting, brokerage, management, appraisal and related activities. Jackson-Cross has substantial experience in commercial real estate matters, including consulting, real estate brokerage, property management, property appraising and the review and approval of construction budgets. It currently manages approximately 10 million square feet of diverse industrial and commercial properties and office building space.

The Plan chose Jackson-Cross to act as independent fiduciary for the purpose of determining that (a) the agreed upon value of One Market Plaza was fair; (b) the terms of the lease of office space in One Market Plaza by Separate Account No. 178 to EREIM were fair; and that (c) the transaction was in the best interest of the Plan. The Plan's selection of Jackson-Cross was based on its past experience with Jackson-Cross, including its role as independent fiduciary under PTE 88-92 for Separate Account No. 143. The applicant represents that Jackson-Cross is independent from Equitable and receives less than 5 percent of its total yearly fees from Equitable and Equitable separate accounts.

8. Jackson-Cross acknowledged in writing (the Jackson-Cross letter) its role as independent fiduciary with respect to the transactions. The Jackson-Cross letter states that Jackson-Cross reviewed the negotiations between the Plan and Equitable prior to the date of

<sup>1</sup> In light of the fact that EVLICO is a wholly-owned subsidiary of Equitable, all references to Equitable in this proposal also include reference to EVLICO.



the transactions. Charles F. Seymour, Arnold S. Tesh and Dwight E. Wagner of Jackson-Cross served on the Independent Fiduciary Committee (the Committee), which acted as fiduciary for Separate Account No. 143 with respect to the purchase by the Plan of Equitable's remaining interest in One Market Plaza. In connection with its duties as fiduciary, the Committee and/or Jackson-Cross conducted the following activities:

(a) Inspection of the property involved in the transaction;

(b) Review of the quarterly reports of all of the assets in Separate Account No. 143, including operating summaries and the latest quarterly valuations by Equitable's appraisal department;

(c) Participation in meetings twice each year with representatives of Equitable and the Plan to review the office portfolio in Separate Account No. 143;

(d) Review of the rent rolls of One Market Plaza and an analysis of the market in the San Francisco area, including an examination of comparable sales and properties; and

(e) Review of the terms of the lease of office space in One Market Plaza by Separate Account No. 178 to EREIM to ensure that the terms and conditions of the lease were at least as favorable to the Plan as those between unrelated parties.

Based on its review of the terms of the transactions, Jackson-Cross concluded that such transactions were in the best interests of the Plan and recommended that they be concluded.

9. A description of the transactions are as follows:

(a) One Market Plaza, located in San Francisco California, is a three structure complex consisting of an enclosed six-story glass roofed gallery and pedestrian mall and two office buildings. One Market Plaza is subject to two outstanding mortgages, both of which are held by Equitable's General Account. The loan on the building itself had an outstanding balance of approximately \$57 million as of the reallocation date and, as represented by Jackson-Cross, carried a below current market interest rate. The loan on the parking garage had an outstanding balance of \$1.8 million. The ownership interests in the One Market Plaza Joint Venture were allocated as follows: Separate Account No. 143 (90 percent); and Equitable General Account (10 percent).

Through negotiations the parties agreed that the Plan would purchase Equitable's 10 percent interest in the One Market Plaza Joint Venture for \$34,250,000. Further, the Plan prepaid the

existing general account mortgage loans under which the One Market Plaza Joint Venture was obligated in light of Equitable's agreement to waive applicable prepayment penalties. Equitable's interest in the One Market Plaza Joint Venture was transferred to Separate Account No. 178 on March 30, 1990. The IBM Committee appointed the Yarmouth Group to act as real estate investment manager to the Plan with respect to Separate Account No. 178, terminating Equitable's investment management responsibilities on behalf of the Plan with respect to One Market Plaza.

(b) For a period of approximately one year, March 30, 1990 through April 30, 1991, after the One Market Plaza Joint Venture terminated, Separate Account No. 178 leased 14,797 square feet of office space in One Market Plaza to EREIM, a party-in-interest with respect to the Plan. Jackson-Cross represents that, prior to the effective date of the lease, March 30, 1990, they reviewed the terms of the lease and concluded that the terms and conditions of the lease were at fair market value and were at least as favorable to the Plan as those the Plan could obtain from an unrelated third party.

10. In summary, the applicant represents that the proposed exemption meets the criteria of section 408(a) of the Act because: (a) the terms of the transactions were negotiated at arm's-length; (b) the transactions were initiated by the Plan based on its own review of investment needs; (c) the Plan retained Jackson-Cross to act as independent fiduciary with respect to the transactions; (d) Jackson-Cross concluded that the transactions were in the best interest of the Plan; and (e) the terms and conditions of the transactions are at least as favorable to the Plan as those between unrelated parties.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jean Anderson of the Department, telephone (202) 523-8971. (This is not a toll-free number.)

**The Equitable Life Assurance Society of the United States (Equitable) Located in New York, NY**

[Application No. D-8798]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code,

by reason of section 4975(c)(1) (A) through (D) shall not apply to the receipt of common stock of Equitable Companies Incorporated (Equitable Holdings), or the receipt of cash or policy credits,<sup>4</sup> by certain employee benefit plans, other than employee benefit plans maintained by Equitable or an affiliate of Equitable for its own employees,<sup>5</sup> in connection with a plan of reorganization (the Demutualization Plan) adopted by Equitable and implemented pursuant to section 7312 of the New York Insurance Law, provided the following conditions are met:

(1) The Demutualization Plan is implemented in accordance with procedural and substantive safeguards that are imposed under New York law and supervised by the New York Superintendent of Insurance (the Superintendent).

(2) The Superintendent reviews the terms of the options that are provided to any policyholders of Equitable (the Eligible Policyholders) as part of his review of the Demutualization Plan, and the Superintendent only approves the Demutualization Plan following a determination that such plan is fair and equitable to all Eligible Policyholders.

(3) Each Eligible Policyholder has an opportunity to comment on the Demutualization Plan and decide whether to vote to approve such plan after full written disclosure is given such policyholder by Equitable, of the terms of the plan.

(4) Any election by an employee benefit plan to receive stock, cash or policy credits, pursuant to the terms of the Demutualization Plan is made by one or more independent fiduciaries of such plan and neither Equitable nor any of its affiliates exercises any discretion or provides investment advice with respect to such election.

(5) After each Eligible Policyholder receives a minimum of three shares of common stock, additional consideration received by such Eligible Policyholder is based on an actuarial formula determined from the policy's contribution to the surplus of Equitable

<sup>4</sup> As used herein, a policy credit is a dividend, an additional death benefit, a premium credit or an increased policy account value.

<sup>5</sup> Equitable is not requesting, nor is the Department providing exemptive relief herein with respect to the distributions of stock to plans that Equitable or its affiliates maintain for their own employees. Equitable believes that such stock would constitute qualifying employer securities within the meaning of section 407(d)(5) of the Act and that section 408(e) of the Act would apply to such distributions. In this regard, the Department expresses no opinion on whether such distributions would satisfy the terms and conditions of section 408(e) of the Act.



which has been approved by the Superintendent with the assistance of Coopers and Lybrand.

(6) All plans participate in the transactions on the same basis as other Eligible Policyholders that are not plans within their respective groupings.

(7) No Eligible Policyholders pay any brokerage commission or fees in connection with their receipt of stock.

(8) All of Equitable's policyholder obligations remain in force and are not affected by the Demutualization Plan.

#### Summary of Facts and Representations

1. Equitable is a mutual life insurance company organized under the laws of the State of New York. It is one of the largest insurance companies in the United States. As of December 31, 1991, the estimated reserve amounts attributable to employee benefit plan policyholders for each of the relevant product lines were \$404.5 million for group life and health insurance, \$1.69 billion for individual and group annuity contracts and \$116.8 million for individual life insurance policies.<sup>6</sup> Additionally, Equitable has a number of subsidiaries and affiliates that provide a variety of financial services, including investment management and brokerage services. In this respect, Equitable and three major investment management subsidiaries had approximately \$144.7 billion in assets under management as of December 31, 1991. Equitable and its affiliates also provide a variety of fiduciary and other services to employee benefit plans, many of which are Equitable policyholders. Such services include plan administration and related services, investment management services and securities brokerage and related services.

As a mutual life insurance company, Equitable has no shareholders. Policyholders of a mutual life insurance company are members of the company and, in such capacity, are entitled to vote to elect the directors of the company. Members are also entitled to share in the assets of the company upon its liquidation.

2. On November 27, 1991, Equitable's Board of Directors adopted a plan of demutualization under which Equitable would be converted from a mutual life insurance company to a stock life insurance company. Equitable believes that demutualization will put it in a position to access capital by issuing equity securities to public and

institutional investors in order to respond to competitive pressures and to take advantage of new investment opportunities which it is precluded from doing as a mutual life insurance company. In addition, Equitable believes that demutualization will enhance its long-term strength and benefit its policyholders from a stronger balance sheet and the likelihood of a higher credit rating. Further, Equitable explains that its conversion to a stock life insurance company will provide other benefits, including giving Eligible Policyholders stock, cash or policy credits in exchange for their illiquid membership interests; the flexibility to cause non-insurance operations to direct holdings of an upstream holding company as described below; and the ability to use stock options to attract and retain talented employees.

3. In accordance with its proposed demutualization, Equitable has outlined the pertinent provisions of the New York Insurance Law. In relevant part, section 7312 of the New York Insurance Law establishes an approval process for the demutualization of a life insurance company. Under section 7312, the conversion of a mutual life insurance company to a stock life insurance company must be initiated by the board of directors of the mutual life insurance company, which may approve a plan of demutualization only by a vote of at least 75 percent of the entire board upon a finding that the plan of demutualization is fair and equitable to all policyholders.

Once approved by the board, a plan of demutualization must be submitted to the New York Superintendent of Insurance for his review. For the demutualization plan to become effective, the Superintendent must determine that the plan meets the requirements imposed by section 7312, including the requirements that the plan be fair and equitable for the policyholders and not be detrimental to the public, and that following the demutualization, the insurer will have an amount of capital and surplus which the Superintendent deems to be reasonably necessary for its future solvency.

To assist the Superintendent in discharging his duties, section 7312 requires the Superintendent to appoint an independent actuary to review the actuarial aspects of the plan. In addition, the Superintendent is permitted to appoint other qualified, disinterested persons or institutions to serve as consultants. In the case of the Equitable demutualization, the Superintendent has hired Coopers & Lybrand to conduct the required actuarial review and the investment

banking firms of Wasserstein Perella & Company, Inc. and Alexander Brown & Sons, Inc., as investment banking consultants. For legal advice, the Superintendent has retained the law firm of Willkie, Farr and Gallagher.

Section 7312 further requires the Superintendent to hold a public hearing on the plan of demutualization at which time policyholders and other interested persons may express their views on the plan. Notice of the public hearing must be provided to each policyholder of the insurance company whose policy or contract is in force on the date of adoption of the plan of demutualization, and must be published in three newspapers of general circulation. The purpose of the public hearing is to allow interested persons the right to comment on the fairness of the terms of the demutualization, its rationale and purposes, and to consider whether the demutualization is in the interest of the insurance company and its policyholders and is not detrimental to the public.

After the public hearing, the Superintendent must determine whether or not to approve the plan of demutualization. In this connection, the Superintendent will approve such plan if he finds that it does not violate the insurance law, that it is fair and equitable to the policyholders, that it is not detrimental to the public, and that after giving effect to the demutualization, the insurer will have an amount of capital and surplus that the Superintendent deems to be reasonably necessary for the company's future solvency. The Superintendent must also determine that the plan of demutualization has a purpose and provides for the enhancement of the operations of the reorganized insurer and will not substantially lessen competition in any line of the insurance business. A decision by the Superintendent to approve the demutualization plan is subject to judicial review in the New York courts.

The policyholders of the mutual life insurance company must also be provided with notice of the plan and an opportunity to vote on whether or not to approve the plan. Each policyholder is entitled to one vote, and the plan must be approved by a vote of at least two-thirds of all votes cast by policyholders entitled to vote.<sup>7</sup>

<sup>6</sup> Equitable represents that these figures are net of reinsurance ceded to other insurers and also exclusive of reserves attributable to Equitable separate accounts (other than guaranteed interest separate accounts).

<sup>7</sup> Equitable anticipates that approximately 2.2 million policyholders will be eligible to vote on the Demutualization Plan. At least 30 days prior to the public hearing on the Demutualization Plan, Equitable will provide each Eligible Policyholder with an official summary of the plan that has been



4. Equitable filed its Demutualization Plan with the Superintendent on December 3, 1991. As discussed above, the Superintendent is required to hold a public hearing and determine whether or not to approve the plan. Equitable anticipates that the public hearing will be held during the Spring of 1992 and that the affirmative vote of two-thirds of all Eligible Policyholders whose insurance policies were in effect as of November 27, 1991 (the adoption date of the Demutualization Plan by Equitable's Board of Directors) will occur in the second quarter of 1992. Equitable also anticipates that the Superintendent's decision on whether to approve the Demutualization Plan will be made during the second quarter of 1992.

5. Equitable represents that the Demutualization Plan provides for the formation of Equitable Holdings, a holding company that was incorporated on July 15, 1992. Equitable Holdings has been organized initially as a subsidiary of Equitable, and Equitable owns the outstanding stock of Equitable Holdings. On the effective date of the Demutualization Plan, Equitable will issue common stock to Equitable Holdings. In addition, Equitable will surrender to Equitable Holdings (and Equitable Holdings will cancel) all of the Equitable Holdings common stock that is presently held by Equitable. Thus, Equitable will become a subsidiary of Equitable Holdings. All of Equitable's insurance policies will remain in force and all policyholders will be entitled to receive all of the benefits under their policies and contracts to which they would have been entitled if the Demutualization Plan had not been adopted.

6. In connection with Equitable's proposed demutualization, on July 18, 1991, AXA S.A. (AXA), a French insurance company, made a \$1 billion cash investment in Equitable by purchasing a Secured Note (the Secured Note) in the aggregate principal amount of \$750 million and a Surplus Note (the Surplus Note) in the principal amount of \$250 million. (The Secured Note and the Surplus Note are collectively referred to herein as the Notes.) The Secured Note was issued to AXA pursuant to the terms of an Investment Agreement among Equitable, Equitable Holdings and AXA in July 1991. The Secured Note pays interest semiannually in an amount

equal to its investment earnings (including realized and unrealized gains and losses) of a collateral account in which the \$750 million in proceeds from the Secured Note has been placed. The collateral is subject to a Security Agreement by and between Equitable, AXA and Morgan Guaranty Trust Company of New York, as collateral agent. The collateral proceeds are invested in cash, securities, short term instruments and time deposits such that the appreciation from the investments will accrue to AXA. The Secured Note matures on the earlier of June 30, 1996 or the date on which AXA's Investment Agreement is terminated in accordance with its terms.

The Surplus Note is an unsecured obligation of Equitable that matures on July 18, 1994. It bears interest at an annualized rate which is equal to the six month London interbank offered rate in effect from time to time plus one percent. Payments with respect to the Surplus Note are subject to the approval of the Superintendent.

7. Under the terms of the respective agreements, AXA will exchange both of the Notes simultaneously at the initial public offering of Equitable Holdings stock. The public offering is expected to coincide with the effective date of the Demutualization Plan (i.e., not more than six months after the Superintendent's approval of the plan, unless such plan is otherwise extended). As a precondition to the exchange, the net proceeds realized from the initial public offering must total at least \$300 million, otherwise AXA is not required to participate.

Assuming \$300 million in net proceeds is realized, AXA will exchange the Notes at their "accreted value"<sup>8</sup> for Equitable Holdings stock at a per share price initially based on the price at which such shares are sold in the initial public offering. In the exchange, AXA is expected to acquire between 40-49 percent of the total outstanding Equitable Holdings stock, depending on the market price at that time. The remaining shares of the stock will be acquired by members of the public and Eligible Policyholders, including employee benefit plans, as discussed below.

<sup>8</sup> Equitable explains that for purposes of the exchange, the Notes will be valued at the sum of their face value of \$1 billion plus an amount thereon (the accretion amount) which is calculated at an annualized rate of 22 percent, compounded annually, from July 18, 1991 (the date of the AXA investment) to the effective date of the Demutualization Plan, less an amount calculated by reference to the amount of interest actually paid on the Notes through the effective date.

The exchange price is subject to adjustments and limitations on a basis that takes into account the average of the initial public offering price for the stock and the average closing price of the Equitable Holdings stock for the 40 trading day period following the 20th day of trading of such stock on the New York Stock Exchange (the NYSE). Accordingly, Equitable represents that the number of shares of Equitable Holdings stock that will be received by AXA upon the exchange of the Notes, will take into account later fluctuations in the market price of such stock due to trading activity. Generally, if the stock trades at a lower average price over this period, AXA will receive additional stock (common or preferred depending on whether the 49 percent cap on common stock has been reached) and if the stock trades at a higher average price, AXA will be required to return such stock for cancellation.<sup>9</sup> Equitable also represents that neither it nor any other person will make upward or downward adjustments in the price of Equitable Holdings stock.

Three AXA-nominated individuals have joined Equitable's Board of Directors, and AXA will be entitled, in the future, to nominate representatives on the Equitable Board proportionate to its ownership interest in Equitable Holdings. Equitable represents that AXA's investment in Equitable Holdings will add to Equitable's financial strength and will not impair Equitable's policy commitments or other obligations.

8. Equitable's Demutualization Plan will provide for Eligible Policyholders to receive a minimum of three shares of common stock of Equitable Holdings (the fixed component)<sup>10</sup> as

<sup>9</sup> If, under the formula used to determine the number of shares to be received by AXA in connection with the demutualization, AXA receives less than 40 percent of the outstanding common stock of Equitable Holdings, AXA will have the right to buy enough additional shares of Equitable Holdings common stock at the exchange price (as finally adjusted) to bring its ownership up to 40 percent. If under the formula, AXA would receive more than 49 percent of the outstanding common stock of Equitable Holdings, then only 49 percent of the shares of common stock will be issued to AXA, and AXA will receive the remainder of the exchange value of its investment in shares of preferred stock of Equitable Holdings (all of which may be convertible into common stock).

<sup>10</sup> After the allocation of the fixed component is made to Eligible Policyholders, the remainder of the shares reserved for distribution to Eligible Policyholders will be allocated to Eligible Policyholders that own participating policies as a variable component of the distribution. The variable component will be allocated among these Eligible Policyholders based on the estimated past contributions to the surplus of Equitable and the estimated present value of the expected future contributions to surplus of their participating

Continued

approved by the Superintendent and which discusses such policyholder's rights. Eligible Policyholders are also expected to receive additional information about Equitable which will include financial statements, the intended uses of the proceeds from the public offering, and a discussion and analysis of Equitable's financial condition and the results of its operations.



consideration for giving up their membership interests in the mutual life insurance company, which interest will be extinguished as a result of the demutualization. As noted above, such stock will be actively traded on a national securities exchange, such as the NYSE, and it may be transferred to other shareholders. As also stated above, Eligible Policyholders are essentially those policyholders whose insurance policies or annuity contracts that were issued by Equitable were in force as of November 27, 1991 and still remain in force on the date that the Demutualization Plan becomes effective.<sup>11</sup>

9. In general, an Eligible Policyholder will receive cash unless such policyholder indicates a preference to receive stock, resides outside the United States or Canada, has mail that is undeliverable or has a policy that is subject to a lien or to a bankruptcy proceeding. In addition, those Eligible Policyholders who are allocated ten or fewer shares of stock will receive cash or policy credits instead of stock. The cash or policy credits that are received by these policyholders will have a value equal to the stock such policyholders would otherwise have received, based on the price per share of Equitable Holdings stock in the initial public offering. For purposes of allocating the consideration, Equitable represents that all policyholders will be treated the

policies. These determinations will be made separately for each class of business specified in the Demutualization Plan (e.g., individual life insurance, individual annuities, group annuity contracts, etc.). The allocations will be based on methodologies developed by Equitable's actuaries and examined and approved by the Superintendent with assistance of Coopers & Lybrand.

<sup>11</sup> Equitable represents that under sections 7312(a)(2), (e) and 4210(a)(3) of New York Insurance Law, the stock, cash, policy credits or other compensation resulting from the Demutualization Plan must be distributed to "policyholders," as determined by the records of the mutual life insurance company. Equitable further represents that an insurance or annuity policy that provides benefits under an employee benefit plan, typically designates the employer that sponsors the plan, or a trustee acting on behalf of the plan, as the policyholder. In this regard, Equitable asserts that it is required under New York Insurance Law to make distributions resulting from the Demutualization Plan to the employer or the plan sponsor when they are the designated policyholder on the plan policy.

In general, it is the Department's view that, if an insurance policy (including an annuity contract) was purchased with assets of an employee benefit plan, and if there exist any participants covered under the plan (as defined at 29 CFR 2510.3-3) at the time when Equitable incurs the obligation to distribute stock, cash, policy credits or other compensation, then such consideration would constitute an asset of such plan. Under these circumstances, the appropriate plan fiduciaries must take all necessary steps to safeguard the assets of the plan in order to avoid engaging in a violation of the fiduciary responsibility provisions of the Act.

same within their class groupings. Equitable also states that no Eligible Policyholder will be entitled to receive subscription rights in the stock.

10. Under the Demutualization Plan, those Eligible Policyholders who are entitled to receive stock will do so without the payment of any brokerage commissions or similar fees. In addition, Equitable will establish a commission-free sales program under which Eligible Policyholders who receive twenty or fewer shares of stock will, for a limited three month period beginning nine months after the Demutualization Plan becomes effective, be entitled to sell in the public market all of the common stock they have received pursuant to the Demutualization Plan. Any such sale of the stock will be conducted at the current market price for the stock and without the payment of any commissions or similar fees to Equitable. Equitable explains that the market price for the stock will differ from the initial public offering price as a pricing mechanism will have been established based upon prior trades.

For purposes of the commission-free sales program, Equitable contemplates that the stock will be listed on the NYSE. Sales requests made by Eligible Policyholders will be accumulated by First Chicago Trust Company (First Chicago) of New York, Equitable Holdings' stock transfer agent. First Chicago will arrange for such shares to be sold on a daily basis, subject to appropriate daily limits.<sup>12</sup> If an Eligible Policyholder sells its shares through the program, the policyholder will receive an amount equal to the average proceeds per share realized on sales of the shares during a specified averaging period during which the policyholder's shares were sold. A check for the sales proceeds will be sent to each such policyholder.

11. In summary, it is represented that the proposed transactions will satisfy the statutory criteria for an exemption under section 408(a) of the Act because: (a) the Demutualization Plan will be implemented in accordance with the section 7312 of the New York Insurance

<sup>12</sup> Equitable represents that it has not made a final decision regarding the broker that will actually effect sales of stock under the commission-free sales program. Equitable explains, however, that it is possible that its affiliate, the Pershing Division of Donaldson, Lufkin & Jenrette Securities Corporation (Pershing), may provide these services. The performance of these services, Equitable notes, will not involve any fiduciary activity on behalf of employee benefit plans and no commissions will be paid by the selling policyholders in connection therewith. In the event Pershing is retained to effect securities transactions as part of the program, Equitable states that it will pay all of Pershing's fees.

Law and it must be approved and supervised by the Superintendent of Insurance; (b) any election by an employee benefit plan to receive stock, cash or policy credits, pursuant to the Demutualization Plan, will be made by one or more independent fiduciaries of such plan and neither Equitable nor any of its affiliates will exercise any discretion or render investment advice with respect to such election; (c) after each Eligible Policyholder receives a minimum of three shares of stock, additional consideration paid to such Eligible Policyholder will be based upon an actuarial formula and determined from the policy's contribution to the surplus of Equitable which has been approved by the Superintendent with the assistance of Coopers and Lybrand; (d) no Eligible Policyholder will pay any brokerage commissions or fees in connection with such policyholder's receipt of stock; (e) all plans will participate in the transactions on the same basis as other Eligible Policyholders which are not plans within their respective class groupings; and (f) the terms of the Demutualization Plan and the rights of Eligible Policyholders with respect thereto, will be fully disclosed in writing by Equitable.

#### NOTICE TO INTERESTED PERSONS

Notice of the proposed exemption will be given to all interested persons within 5 days of the date of publication of the notice of pendency in the *Federal Register*. Such notice will include a copy of the notice of proposed exemption as published in the *Federal Register* and shall inform interested persons of their right to comment. Comments with respect to the notice of proposed exemption are due within 35 days after the date of publication of this exemption in the *Federal Register*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his



duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC this 7th day of April, 1992.

Ivan Strasfeld,

Director of Exemption Determinations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 92-8337 Filed 4-9-92; 8:45 am]

BILLING CODE 4510-29-M

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Records Schedules; Availability and Request for Comments

**AGENCY:** National Archives and Records Administration, Office of Records Administration.

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Records schedules identify records of sufficient value to warrant

preservation in the National Archives of the United States. Schedules also authorize agencies after a specified period to dispose of records lacking administrative, legal, research, or other value. Notice is published for records schedules that (1) propose the destruction of records not previously authorized for disposal, or (2) reduce the retention period for records already authorized for disposal. NARA invites public comments on such schedules, as required by 44 USC 3303a(a).

**DATES:** Request for copies must be received in writing on or before May 26, 1992. Once the appraisal of the records is complete, NARA will send a copy of the schedule. The requester will be given 30 days to submit comments.

**ADDRESSES:** Address requests for single copies of schedules identified in this notice to the Records Appraisal and Disposition Division (NIR), National Archives and Records Administration, Washington, DC 20408. Requesters must cite the control number assigned to each schedule when requesting a copy. The control number appears in the parentheses immediately after the name of the requesting agency.

**SUPPLEMENTARY INFORMATION:** Each year U.S. Government agencies create billions of records on paper, film, magnetic tape, and other media. In order to control this accumulation, agency records managers prepare records schedules specifying when the agency no longer needs the records and what happens to the records after this period. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. These comprehensive schedules provide for the eventual transfer to the National Archives of historically valuable records and authorize the disposal of all other records. Most schedules, however, cover records of only one office or program or a few series of records, and many are updates of previously approved schedules. Such schedules also may include records that are designated for permanent retention.

Destruction of records requires the approval of the Archivist of the United States. This approval is granted after a thorough study of the records that takes into account their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and historical or other value.

This public notice identifies the Federal agencies and their subdivisions requesting disposition authority, includes the control number assigned to each schedule, and briefly describes the records proposed for disposal. The

records schedule contains additional information about the records and their disposition. Further information about the disposition process will be furnished to each requester.

### Schedules Pending

1. Office of the Secretary of Defense (NI-330-92-2). Office of Operational Test and Evaluation technical reference materials.

2. Department of the Navy, Bureau of Medicine and Surgery (NI-NU-92-2). Family Advocacy Files.

3. Department of Commerce, International Trade Administration (NI-151-92-2). Records of the International Economic Policy, Office of Canada, Free Trade Agreement Binational Secretariat.

4. Department of Commerce, Bureau of Economic Analysis (NI-375-89-1). Records of the Regional Economic Analysis Division, Analysis Branch.

5. Farm Credit Administration (NI-103-92-1). Indemnity account records.

6. Federal Communications Commission, Office of Chief Engineer (NI-173-92-). Experimental Station License Files, 1934-74.

7. Federal Deposit Insurance Corporation, Division of Supervision (NI-34-91-7). Revisions to the division's comprehensive schedule.

8. General Accounting Office (NI-411-90-10). Copies of blueprint drawings of the GAO Headquarters Building (originals have been transferred to the National Archives).

9. Department of Health and Human Services, Centers for Disease Control (NI-442-91-9). Comprehensive schedule covering the electronic records systems of the Center for Prevention Services.

10. Department of Health and Human Services, Centers for Disease Control, National Center for Health Statistics (NI-442-91-13). Electronic and microfilm records containing data input into the main data file of the abortion module of the Vital Statistics Registration system.

11. Indian Arts and Crafts Board (NI-435-92-2). Comprehensive schedule for audiovisual and publicity-related records.

12. Department of the Interior, Bureau of Land Management, Texas Acquired Minerals Project (NI-49-91-2). Routine administrative, facilitative, background, and duplicative input records.

13. Department of Justice, Executive Office for United States Attorneys (NI-118-92-1). Administrative records for the Special Assistant Program.

14. Department of Labor, Bureau of Employment Security (NI-183-91-1). Correspondence, surveys, reports, proposals, subject files, and other



administrative and housekeeping records, 1936-69.

15. Department of State, Foreign Buildings Office (NI-59-92-6). Routine and facilitative financial records.

16. Tennessee Valley Authority, Resource Development (NI-142-90-15). Hydrographs of daily flow and water elevations in the TVA reservoir system.

17. Tennessee Valley Authority, Atmospheric Science Department (NI-142-91-10). Subject files documenting routine administrative activities (the remainder of this file is designated for transfer to the National Archives).

18. Tennessee Valley Authority, Information Services and Power Engineering and Construction (NI-142-91-12). Engineering geological data.

19. Tennessee Valley Authority, Retirement Services (NI-142-91-16). Retirement records.

20. Tennessee Valley Authority, Customer Group (NI-142-92-2). Area Dispatch and Control Center System Alarm summary.

21. Department of the Treasury, Office of Thrift Supervision (NI-483-92-1). Records of the Human Resources Division.

22. Department of the Treasury, Office of Thrift Supervision (NI-483-92-3). Records of the Minority Affairs Division.

23. Department of the Treasury, Office of Thrift Supervision (NI-483-92-6). Payroll/personnel database.

Dated: April 1, 1992.

Claudine J. Weiher,

Acting Archivist of the United States.

[FR Doc. 92-8270 Filed 4-9-92; 8:45 am]

BILLING CODE 7515-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket No. 40-8027, License No. SUB-1010, EA 92-059]

### Sequoyah Fuels Corp. Gore, OK; Confirmatory Order Modifying License (Effective Immediately)

I

Sequoyah Fuels Corporation (SFC or Licensee) is the holder of Source Material License No. SUB-1010 issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR part 40. The license authorizes possession and use of source material in the production of uranium hexafluoride (UF<sub>6</sub>) and depleted uranium tetrafluoride (DUF<sub>4</sub>) in accordance with the terms and conditions of the license. The license was due to expire on September 30, 1990, but currently remains in effect based on a timely

renewal application submitted by the Licensee.

II

The Commission issued an Order Modifying License (Effective Immediately) to SFC (EA 92-045) on March 13, 1992, to impose as new license conditions reporting requirements intended to give the NRC added assurance that issues of potential safety and regulatory significance are promptly brought to the NRC's attention. By letter dated March 16, 1992, SFC consented to the Order. The Licensee subsequently identified a number of questions with regard to application or interpretation of the new reporting requirements. Examples of those questions were provided to the NRC by letter dated March 24, 1992, and a public meeting was held on March 26, 1992, to discuss SFC's understanding of the new reporting requirements.

III

Based on information developed during the March 26, 1992, public meeting, modification of the March 13, 1992 Order is necessary to clarify the intent of section IV.C. Section IV.C required, in part, the reporting of "Any failure of equipment of facilities, or failure to follow procedures, which leads to \* \* \*" (one of three types of contamination events). The NRC is interested in being informed of any of those contamination events, whether caused by the specified failures or any other inadequacy, such as an inadequate procedure. Changing that phrase to "Any occurrence which leads to \* \* \*" clarifies the NRC's intent. Subsection (2) of Section IV.C addressed reporting of "any contamination in restricted areas that requires activities in an area to be suspended for more than 24 hours pending decontamination." By modifying the 24 hour time period for decontamination to 8 hours, an appropriate threshold for reporting onsite contamination events that require at least one shift to clean up is established. This ensures that the Licensee will report items of potential safety or regulatory significance to the NRC.

Consequently, for the reasons given in the March 13, 1992, Order and explained above, it is necessary to require that License No. SUB-1010 be modified to clarify the intent of the new reporting requirements. The Licensee's president agreed to the terms of this Order in a meeting on April 1, 1992. Furthermore, pursuant to 10 CFR 2.202, for the reasons stated in the March 13, 1992 Order, I find that the public health, safety and

interest require that this Order be effective immediately.

IV

Accordingly, pursuant to sections 63, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR part 40, *It is Hereby Ordered*, Effective Immediately, That section IV.C to the order issued March 13, 1992 is modified to read as follows:

C. Any occurrence which leads to (1) offsite release or contamination in unrestricted areas in excess of SFC's administrative limits; (2) any contamination in restricted areas that requires activities in an area to be suspended more than 8 hours pending decontamination; or (3) any personnel contamination in excess of SFC's administrative limits which within one hour of detection is not reduced to within limits.

The Regional Administrator, Region IV, may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee of good cause.

V

Any person other than the Licensee adversely affected by this Confirmatory Order may request a hearing within 20 days of its issuance. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Attn: Chief, Docketing and Service Section, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, suite 400, Arlington, Texas 76011 and to the Licensee. If such a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. An answer



or a request for hearing shall not stay the immediate effectiveness of this order.

Dated at Rockville, Maryland this 3rd day of April 1992.

For the Nuclear Regulatory Commission.

Hugh L. Thompson, Jr.,

Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support.

[FR Doc. 92-8335 Filed 4-9-92; 8:45 am]

BILLING CODE 7590-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-30555; File No. SR-DTC-92-07]

### Self-Regulatory Organizations; The Depository Trust Company; Filing and Order Granting Accelerated Approval on a Temporary Basis of Proposed Rule Change Relating to Implementation of Commercial Paper Program

April 3, 1992.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on March 27, 1992, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice and order granting accelerated approval, on a temporary basis until April 30, 1992, to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

DTC's proposed rule change would permit, until April 30, 1992, DTC's Same Day Funds Settlement ("SDFS") service to allow incorporation of families of accounts, valued pledges, and a \$400 million fixed cap on the portion of each Participant's required and voluntary contributions to the Participants Fund that are allocated to the SDFS service ("SDFS fund").

#### II. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change, and discussed any comments it received on the proposed

rule change. The text of these statements may be examined at the places specified in Item IV below. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

(a) On October 3, 1990, the Commission approved, on a temporary basis until April 3, 1992, a proposed rule change partially implementing DTC's Commercial Paper ("CP") program into DTC's SDFS service. That proposal provided for families of accounts, valued pledges, and a \$400 million fixed cap on the SDFS fund.<sup>1</sup> Thereafter, the Commission approved, on a temporary basis until April 30, 1992, two proposed rule changes, filed by DTC, one implementing<sup>2</sup> and the other modifying<sup>3</sup> the CP program in the SDFS service. Recently, on February 10, 1992, DTC filed a proposed rule change requesting that the Commission make permanent DTC's CP program in its SDFS system.<sup>4</sup> Because of the close correlation of all of these proposed rule changes, DTC believes it is appropriate to consider all the proposals at the same time. Thus, DTC requests that the Commission extend the current temporary approval of families of accounts, valued pledges in the SDFS service, and the \$400 million dollar fixed cap on the SDFS fund until April 30, 1992.

(b) DTC believes the proposed rule change is consistent with the requirements of section 17A of the Act in that it promotes the prompt and accurate clearance and settlement of transactions in securities that settle in same-day funds.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No comments on this proposed rule change were solicited, and none have been received.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Commission believes that the proposal is consistent with section 17A of the Act and specifically with section 17A(b)(3)(F) of the Act.<sup>5</sup> That section requires the rules of a clearing agency to be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which the clearing agency is responsible. The families of accounts, valued pledges, and \$400 million fixed cap on the SDFS fund will facilitate the flow of transaction processing through the SDFS system and reduce the potential liquidity burdens that may result from its prior account structure without significantly increasing DTC's risk exposure. By approving the proposed rule change on a temporary basis through April 30, 1992, DTC, the Commission, and other interested parties will be able to assess further, prior to permanent Commission approval, the policies proposed by this rule change.

DTC has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of the filing. The Commission finds good cause for so approving because the Commission believes it desirable that the proposed rule change be approved before the expiration of the Commission's previous order that temporarily approved these changes to the SDFS system. By approving these proposed rule changes on a temporary basis, until April 30, 1992, the Commission will be able to assess further these proposed rule changes in connection with DTC's other proposal involving its CP program and SDFS service.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the

<sup>1</sup> See Securities Exchange Act Release No. 28515 (October 3, 1990), 55 FR 41401.

<sup>2</sup> See Securities Exchange Act Release No. 28518 (October 5, 1990), 55 FR 42114.

<sup>3</sup> See Securities Exchange Act Release No. 29604 (August 23, 1991), 56 FR 43048 (modifying the formula by which DTC calculates adjustable net debit caps).

<sup>4</sup> See Securities Exchange Act Release No. 30410 (February 25, 1992), 57 FR 7826 (notice of filing requesting permanent approval of DTC's CP program in its SDFS service).

<sup>5</sup> 15 U.S.C. 78q-1(b)(3)(F) (1988).



submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of DTC. All submissions should refer to File No. SR-DTC-92-07 and should be submitted by May 1, 1992.

#### V. Conclusion

For the reasons stated above, the Commission finds that DTC's proposed rule change is consistent with section 17A of the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act<sup>6</sup> that the proposed rule change (File No. SR-DTC-92-07) be, and hereby is, approved on a temporary basis until April 30, 1992.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92-8322 Filed 4-9-92; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-30556; File No. SR-MSRB-90-4]

#### Self-Regulatory Organizations; Order Approving Proposed Rule Change of the Municipal Securities Rulemaking Board Relating to the Proposed Operation of the Continuing Disclosure Information Pilot System of the Municipal Securities Information Library System

April 6, 1992.

#### I. Introduction

The Municipal Securities Rulemaking Board ("MSRB" or "Board") submitted to the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change<sup>1</sup> on June 22, 1990,

pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and rule 19b-4<sup>3</sup> thereunder. October 7, 1991, the MSRB filed with the Commission an amendment to the proposed rule change. The proposed rule change, as amended, would permit the Board to establish and operate the Continuing Disclosure Information Pilot System ("CDI Pilot System"), to accept and disseminate voluntary submissions of official continuing disclosure documents relating to outstanding issues of municipal securities. The system will function as part of the Municipal Securities Information Library ("MSIL") system.<sup>4</sup>

Notice of the filing of the proposal was published in Securities Exchange Act Release No. 28199 (July 12, 1990), 55 FR 29691. The Commission received 84 comment letters in response to this notice. Of those comment letters, 53 expressed support for the proposal, 26 were in opposition and five opposed the proposal as originally drafted but provided specific comments for its improvement. Notice of the amendment to the proposal was published in Securities Exchange Act Release No. 29824 (October 15, 1991), 56 FR 54597. The Commission received six comment letters in response to this notice. Of those comment letters, three express support for the proposal as amended, two are in opposition, and one supports the proposal as amended with specific comments for its improvement.

#### II. Background

The MSRB rules require dealers to disclose to a potential customer all material facts about a proposed transaction,<sup>5</sup> to recommend the transaction to the customer only if it is suitable for the customer<sup>6</sup> and to price the transaction correctly.<sup>7</sup> These requirements are for the protection of customers and are similar or identical to the requirements placed on dealers in other securities markets.

In the course of its self-regulatory activities, the Board observed a need for an improved flow of information about

municipal securities issues bought and sold in the secondary market. In particular, the Board observed that market participants, including dealers, often do not have access to the documents prepared by issuers and trustees concerning issues of municipal securities in the secondary market during the life of the bonds ("Continuing Disclosure Information" or "CDI").

Examples of CDI include periodic financial reports prepared by issuers, which reflect on the credit quality of the issuers' outstanding securities. Other types of CDI may be provided by the trustee for an issue. The security for many outstanding issues is structured around revenue from specific sources or specific assets (e.g., a hospital, a retirement center, or single family mortgages). Trustees for these "structured" issues sometimes generate CDI in the form of notices or reports bearing directly upon the financial status of these issues and the likelihood of default or redemption prior to maturity.

Currently, there is no central source where CDI can be obtained. The Board contends that, in today's market, access to CDI would be helpful for dealers to determine the material facts about a transaction, to determine if a transaction is suitable for a specific customer and to price the transaction correctly. The Board notes that it has encountered many situations in which the lack of readily available CDI has caused serious discontinuity in pricing. The Board believes that, in many cases, lack of ready access to CDI prevents dealers from fully satisfying their investor protection obligations under Board rules. Similar situations may occur after an issuer has announced its intent to pre-refund<sup>8</sup> securities, which may shorten the anticipated maturity date of may increase the credit quality and therefore may change the pricing of the security.

For example, trustees currently produce notices, sometimes called "pre-default" notices, that are designed to inform bondholders of certain facts within the direct knowledge of the trustee, e.g., that a reserve fund has been invaded by the trustee. The events described in these notices, once known by the market, may affect significantly the price of the issue. The notices, however, often are made available

require underwriters to deliver advance refunding documents to the MSRB.

<sup>1</sup> 15 U.S.C. 78s.

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The MSIL system was approved at an open meeting of the Commission on June 6, 1991. Securities Exchange Act Release No. 29298 (June 13, 1991), 56 FR 28194. The Commission also approved the rule change amending MSRB rule G-36. Securities Exchange Act Release No. 29299 (June 13, 1991), 56 FR 28204. At that meeting, the Commission also discussed, but tabled further consideration of, the instant proposed rule change.

<sup>4</sup> MSRB rule G-17.

<sup>5</sup> MSRB rule G-19.

<sup>6</sup> MSRB rule G-30.

<sup>7</sup> Pre-refunding, also called advance refunding, is a procedure whereby outstanding securities are refinanced by the proceeds of a new issue of securities, prior to the date on which the outstanding securities become due or are callable.

<sup>6</sup> 15 U.S.C. 78s(b)(2) (1988).

<sup>7</sup> File No. SR-MSRB-90-4. The proposed rule change was filed simultaneously with two other rule changes: File No. SR-MSRB-90-2, to permit the Board to establish and operate a central electronic facility, the MSIL system, through which information collected pursuant to MSRB rule G-36 would be made available electronically to market participants and information vendors; and File No. SR-MSRB-90-3, to amend MSRB rule G-36 to



exclusively to bondholders, providing an opportunity for bondholders to sell the securities in advance of the information reaching the market. The market may not become aware of the existence of the notices until weeks or even months after the trustee has provided the information to bondholders.

The Board believes that improved access to CDI is necessary not only so that dealers can comply with the Board's customer protection rules, but also to enhance the integrity and efficiency of the market. The lack of access to CDI not only creates problems in specific transactions, but also creates general inefficiency in the market. Market participants are aware that their transactions may be executed based on incomplete or erroneous information about the securities and this is necessarily taken into account in pricing transactions, thus eroding the accurate pricing of those securities and the general efficiency of the market.

Finally, the Board believes that the existence of a central repository for CDI, which provides a neutral, fair and timely dissemination mechanism for disclosure information, would not only increase the availability of the CDI currently produced, but also encourage voluntary efforts in the industry to improve the content and timing of CDI.

In recent years, more issuers are following the suggestions of issuer and analyst groups and providing CDI.<sup>9</sup> In addition, the American Bankers Association ("ABA"), representing bank trustees, has published guidelines for bank trustees on CDI ("Guidelines").<sup>10</sup> The ABA Guidelines are designed to assist trustees in determining the content and timing of various types of disclosures on a voluntary basis. The Guidelines state that the establishment of a central repository to receive CDI is the best way of providing equal access to information for all and is, therefore, essential for secondary market disclosure. The Board believes that, as evidenced by the ABA efforts, the existence of a central repository, which provides a neutral, fair and timely dissemination mechanism for disclosure information, will encourage production of CDI by issuers and trustees and will facilitate voluntary efforts to address

the information problems that continue to exist in the municipal securities market. The Board believes that a central repository for CDI will serve to make these efforts more effective.

### III. Description of CDI Pilot System

The Board plans to operate the CDI Pilot System as part of its proposed MSIL system. The MSIL system, which the Commission has already approved,<sup>11</sup> will accept and electronically record paper copies of official statements and advance refunding documents and disseminate those documents electronically and on paper, with the purpose of increasing the availability of descriptive information on municipal securities issues.

As initially filed with the Commission, the proposed CDI system would have accepted CDI voluntarily submitted by trustees, issuers or persons designated by issuers and would have begun operations by accepting CDI in the form of short, textual disclosure notices. The proposed system would have accepted this CDI only if submitted electronically via computer modem. The system accordingly was called the "Continuing Disclosure Information/Electronic Submission" or "CDI/ES" system. Upon receipt of a disclosure document in electronic form, the CDI/ES system would have retransmitted the document electronically, via computer modem, to all CDI/ES system subscribers simultaneously.

During consideration of this rule filing at the June 6 Open Meeting, the Commission suggested that voluntary submission of CDI would be encouraged if the proposed system accepted paper and/or facsimile transmissions of documents. In response, the Board has revised the proposed rule change to allow the proposed system to accept and disseminate CDI submitted by mail and by facsimile transmission as well as the electronic submissions originally contemplated by the CDI/ES system. During the pilot period, the system would be limited to short disclosure documents of one to three pages in length, or the equivalent in electronic form if provided by modem.

A number of operational efficiencies will result from the joint operation of the CDI Pilot System with the MSIL system, most notably the joint use of a central computerized MSIL index, which identifies issues and the documents on file with respect to those issues.

### A. Pilot Procedure

The Board requests approval of the CDI Pilot System for a period of 18 months. The Pilot System would be implemented in phases. During the first six months of pilot operations, the system would accept disclosure notices only from trustees. The Board believes that limiting the system initially to trustees would allow the Board to gain experience with a relatively limited universe of potential submitters (approximately 1,800 trustees) prior to expanding the system to a much larger and more diverse universe of potential submitters. After the initial phase, issuers would be added to the system.<sup>12</sup>

The Board plans for the CDI Pilot System to accept only short disclosure notices of one to three pages of text, or the equivalent in electronic form if submitted via modem. Many time-critical disclosure documents that can have an immediate effect on market prices fall within this category (e.g., "technical default" or "pre-default" notices by trustees). The Board believes that, by assisting in the dissemination of such notices, the CDI Pilot System would address one of the most important problems with respect to CDI in the municipal securities market, while operating immediately in a successful and cost-effective manner. After gaining experience with short disclosure notices, the Board would evaluate how to expand the system to accommodate longer documents.<sup>13</sup>

At the end of each phase, the Board would evaluate and address any technical, policy and cost issues which arose during that phase, prior to committing the system to greater capacity. The Board would report to the Commission on each phase after it is completed. At the end of the pilot period, the Board would evaluate system operations and decide whether to continue, substantially modify or discontinue the system. The Board would report on the pilot program to the Commission at the end of the pilot period, and any changes or requests for permanent approval would be filed with

<sup>12</sup> The Commission would encourage any issuer wishing to submit CDI to the Pilot System during the initial phase to request that its trustee, if applicable, submit the filing on its behalf to the system.

<sup>13</sup> Many different types and styles of longer documents are considered "disclosure documents" or CDI by issuers, trustees and other market participants. The Board believes that these documents, which are produced in diverse formats, sizes and styles, often contain information that is of little or marginal interest to securities investors and present considerable challenges to any document collection and dissemination system which seeks to provide CDI to the market in a useful and cost-effective manner.

<sup>9</sup> See Government Finance Officers' Association, Disclosure Guidelines for State and Local Government Securities (January 1991); National Federation of Municipal Analysts, Disclosure Handbook for Municipal Securities (January 1990); National Council of State Housing Agencies, Quarterly Reporting Format for State HFA Single Family Housing Bonds (1990).

<sup>10</sup> American Bankers Association Corporate Trust Committee, Disclosure Guidelines for Corporate Trustees (October 1991).

<sup>11</sup> See *supra* note 4.



the Commission for approval under rule 19b-4.

#### *B. Use of System to Make Disclosures*

Before a trustee or issuer could begin submitting documents for dissemination through the CDI Pilot System, it would be required to provide certain information to the Board. The Pilot System would keep this information in a "submitter file." To establish a submitter file with the Board, a trustee or issuer would provide the Board with: (i) Its name and address; (ii) the names and signatures of one or two persons who will be responsible for the documents sent to the system ("designated responsible parties"); and (iii) the telephone numbers that are to be used to communicate with the submitter. Submitters would be responsible for keeping the Board apprised of any changes in the submitter file information.

Upon creation of a submitter file, the Board would: (i) Provide the submitter with a submitter number and (ii) provide each designated responsible party for the submitter with one "personal identification number" ("PIN"). The Board would keep PINs confidential.<sup>14</sup> Each designated responsible party would be responsible for the security of his or her PIN.

After a submitter file is established, a designated responsible party for that submitter would be able to submit CDI to the Pilot System. A submitter would, at its option, either mail a paper document to the system, send the document by facsimile transmission, or send the document electronically by computer modem. To be disseminated by the system, an incoming document would have to be accompanied by the following information: (i) The name and identifying number of the submitter; (ii) the name of the designated responsible party; (iii) the PIN for the designated responsible party; (iv) information to identify the issuer of the securities to which the document relates;<sup>15</sup> (v) the date of the document that is being submitted; (vi) a short description of the document (limited to 320 characters), which would help identify the document to potential readers; and (vii) for facsimile transmissions and mailed

documents, the signature of the designated responsible party.<sup>16</sup> For documents submitted by mail or facsimile transmission, this information would be provided by the submitter on a cover sheet ("cover sheet information"). For transmissions by modem, cover sheet information would be provided by modem.<sup>17</sup>

Before a document is accepted by the Pilot System for dissemination, cover sheet information items (i)-(iii) would be checked to ensure that the information matches information within a submitter file. This review procedure would help to verify the authenticity of a document by ensuring that the document is being received from a designated responsible party. For a document transmitted by modem, these three items would be verified automatically by a computer program. This computer program also would ensure that the modem transmission from the submitter is being sent from the telephone number listed for this purpose in the submitter file and would allow the submitter to give a final authorization to the Board verifying that the document that was received by the Board is the one that the submitter wishes to disseminate.

#### *C. Dissemination of Information*

The Board will operate the output side of the CDI Pilot System to ensure that the information is available in a fair and non-discriminatory manner to all interested parties who wish to subscribe to the service. As with all MSIL services, this service would be available, on equal terms, to any party who requests the service. The Board believes that parties interested in subscribing to the CDI Pilot System will include information vendors wishing to resell the CDI through their own distribution networks.

The CDI Pilot System would provide two methods of dissemination. The primary means of dissemination would be a subscription service transmitting each document accepted by the Pilot system as soon as possible after the document is accepted ("subscription service"). CDI sent to the Pilot System in paper form or by facsimile transmission would be sent to subscribers by facsimile transmission. CDI sent to the

Pilot System by modem would be sent to subscribers by modem. Use of facsimile and modem transmissions for dissemination would provide the CDI to subscribers as quickly as possible and would allow subscribers to have access to the documents on an equal and simultaneous basis.<sup>18</sup> As a secondary means of dissemination, documents provided to subscribers also would be available at the Board's Public Access Facility ("PAF") for review and copying.

Each document disseminated by the system would be accompanied by the following cover sheet information: name of submitter; issuer identification information; the date of the document; and the description of the document prepared by the submitter. The Board would encourage redistribution of the documents and cover sheet information provided by the Pilot System and would not place any restrictions on redistribution.

The Board would operate the CDI Pilot System with the goal of disseminating CDI as quickly as possible after it is received by the system. The actual time period between receipt by the system of a document and its dissemination would depend on a number of factors. The Board estimates that the average time for a person to review and process an incoming document in paper or facsimile form would be approximately 10-15 minutes. After acceptance into the system, the document would be ready for dissemination. However, the speed of facsimile transmission (approximately one minute per page) may create processing queues. In addition, depending on the incoming volume of CDI in paper and facsimile form, processing queues might develop.

The Board is planning the CDI Pilot System so that it can accommodate up to 100 incoming documents per day during the pilot period. The Board also plans for the system to meet the following minimum goals in the event of such a high volume of input:<sup>19</sup> CDI

<sup>18</sup> Once a document has been accepted by the system and is ready for dissemination, the facsimile or modem transmission would begin simultaneously to all subscribers through "chatterbox" technology. This technology permits a scanned message to be sent simultaneously through individual ports for each subscriber. Each port contains a chip capable of transmitting the scanned message. Each subscriber would receive the message on its facsimile machine. However, if a subscriber is not able to begin to receive the transmission (e.g., because its facsimile machine is out of service), transmission to other subscribers would not be delayed.

<sup>19</sup> The Board represents that the system will be able to handle at least 20 subscribers. See *infra* Section III.E.

<sup>14</sup> The Board has represented that in order to assure the confidentiality of documents and PINs at its premises, it will establish security procedures for document handling, including processing documents in a supervised, separate area. Telephone call from Kathryn V. Natale, Assistant Director, Division of Market Regulation, SEC, to Diane G. Klink, General Counsel, MSRB, on December 11, 1991.

<sup>15</sup> The MSRB currently anticipates that this item would be satisfied by providing the name of the issuer and at least one 6-digit number used in the CUSIP numbering system to identify the issuer.

<sup>16</sup> The electronic equivalent of a signature would not be required for documents sent by computer modem.

<sup>17</sup> For those trustees and issuers seeking to submit documents by computer modem, the Board would provide free or at nominal cost (e.g., under \$100) software that would allow the submitter to enter all necessary cover sheet information. The software would guide the submitter in the process of entering cover sheet information and transmitting it and the document to the System.



submitted by computer modem would be disseminated within minutes of the final authorization given by the submitter,<sup>20</sup> and CDI submitted by facsimile transmission and mail would be transmitted to subscribers no later than the day that it is received by the Board. As noted above, the Board anticipates that normal time between receipt and dissemination of a document would be much shorter than this.

As between mail and facsimile transmissions, the Board believes a submitter would be likely to use facsimile transmission if he believes that the CDI contains time-critical information that is of immediate importance to the market. Thus, the Board would give priority in system processing queues to incoming facsimile transmissions over mailed documents.

The CDI Pilot System will be available to accept and disseminate CDI on business days on which the Board's offices are open (generally all business days except for federal holidays).<sup>21</sup> The system would receive documents submitted by mail, facsimile transmission and computer modem from 9 a.m. Eastern Time until 4 p.m. Eastern Time. Subscribers would begin receiving transmissions from the system at 9 a.m. Eastern Time, and transmissions would continue throughout the business day until all documents accepted by the system on that day are transmitted. During PAF business hours (9 a.m. to 4:30 p.m. Eastern Time), PAF users would have access to documents that have been disseminated to subscribers.

#### D. System Design and Facilities Management

Although the technical specifications have not been completed, the Board believes that the system is reasonably designed to handle the anticipated flow of documents, that is, 100 documents per day. The Board also believes that the system is reasonably designed to prevent any external or internal physical attacks. The Board has adopted procedures for establishment of a CDI provider file that should ensure that information only will be accepted from a bank trustee or an issuer (or its designated agent).

<sup>20</sup> Modern transmissions could be processed more quickly than mailed and facsimile transmissions because of the automated processing and dissemination of the documents, which also allows these documents to be processed and disseminated separately from facsimile and mailed transmissions.

<sup>21</sup> The MSRB has represented that it will consider opening on federal holidays on which the securities markets remain open for the purposes of operating the CDI System if demand warrants. Telephone call from Kathryn V. Natale, Assistant Director, Division of Market Regulation, SEC, to Diane G. Klinke, General Counsel, MSRB, on December 11, 1991.

At this time, the Board has not determined what portion, if any, of the CDI Pilot System would be operated by an outside facilities manager. The Board represents that any facilities manager selected for the CDI Pilot System would be subject to the same or more stringent contractual standards for reliability, security, back-up capabilities and conflict of interest as are applicable to the facilities manager for the MSIL system. For any portions of the CDI Pilot System operated directly by Board personnel, similar procedures will be adopted to accomplish these same ends.<sup>22</sup>

#### E. Cost and Fees for Use of the System

The Board states that the operational costs of the CDI Pilot System would be dependent on a number of factors that cannot be predicted in advance, including: (i) The number of submitters that will seek access to the system; (ii) the volume of incoming documents; (iii) the percentage of incoming documents that are mailed, transmitted by facsimile, and transmitted by modem;<sup>23</sup> (iv) the intra-day pattern of submissions;<sup>24</sup> (v) the number of subscribers; and (vi) the number of PAF users seeking CDI and the volume of their document requests. Based on an assumption of 50 incoming documents per day by mail or facsimile transmission, 20 subscribers, and relatively limited PAF use, the Board anticipates that yearly operational costs would fall within a range of \$300,000 to \$500,000. Cost estimates could move outside this range depending on the volume of incoming paper or facsimile documents and the number of subscribers and PAF users.

Although Board funds would be expended to initiate the projects and most likely would be necessary to support the Pilot System, the Board intends that, over time, the operations costs of any Board-operated CDI system would be borne primarily by fees paid by system subscribers and PAF users. Submitters would not be charged a fee

<sup>22</sup> The Commission expects the MSRB to submit a more detailed report on capacity and integrity prior to the commencement of system operations.

<sup>23</sup> Because of automated processing of cover sheet information, modem transmissions would be much less expensive to process than paper or facsimile documents. Facsimile documents would be moderately less expensive to process than mailed documents because they will be received in the form in which they will be disseminated to subscribers.

<sup>24</sup> The Board will incur greater costs if facsimile transmissions are "bunched" at one time period each day because sufficient system personnel would be needed to ensure that these documents are disseminated as quickly as possible on the day that they are received.

to establish submitter files or to submit documents to the system.

The Board states that because operational costs and the number of subscribers and PAF users cannot be predicted at this time, fee estimates for the CDI Pilot System are preliminary and subject to change. The Board believes, however, that at a maximum, total subscriber and PAF fees received by the Board would not exceed the operational costs of the system. At a minimum, fees would cover costs of dissemination of the documents. Subscribers would pay a one time "set-up" fee to cover the cost of equipment and telephone installation necessary to service that subscriber (estimated at \$2,000). In addition, a subscriber would pay a flat fee to receive all documents accepted by the system and would pay the telephone charges actually incurred by the Board to transmit documents to that subscriber. At this time, the Board estimates that first year costs for the subscription service (excluding the set-up fee) would be approximately \$10,000 to \$15,000, plus the cost of telephone service to that subscriber.<sup>25</sup> PAF users would be able to review documents free of charge. Paper copies of documents could be obtained at the PAF at a cost of approximately \$.20 per page.

#### IV. Summary of Comments

The Commission received a total of 90 comment letters on the proposed rule change; 84 in response to the original notice, and six in response to the amendment. Of the comment letters responding to the original notice, 53 express support for the proposal, 26 oppose it, and five oppose the proposal as drafted but provide specific comments for its improvement.<sup>26</sup> In

<sup>25</sup> The annual subscription fee and the set-up fee, once determined, will be required to be filed for Commission approval under Rule 19b-4.

<sup>26</sup> The Commission received comments from seven broker-dealers; four issuer associations (See letters to Jonathan G. Katz, Secretary, SEC, from John T. McEvoy, Executive Director, National Council of State Housing Agencies, dated September 24, 1990 ("NCSHA Letter"); D. Kathryn Fern, President, National Council of Health Facilities Finance Authorities, dated September 24, 1990 ("September, 1990 NCHFA Letter"); Jeffrey L. Esser, Executive Director, Government Finance Officers Association, dated September 24, 1990 ("September 1990 GFOA Letter"); Mary Ellen Withrow, President, National Association of State Auditors, Comptrollers and Treasurers, dated September 24, 1990 ("September, 1990 NASACT Letter") and Edward Renfrow, President, NASACT, dated January 17, 1991 ("January, 1991 NASACT Letter")); 18 issuers; three municipal securities information vendors, all of whom are or view themselves as potential competitors of the Board; six arbitrators; eight investors; nine trustees; nine municipal securities analysts; two bond lawyers; the Public Securities Association (See letter from

Continued



addition, the MSRB responded to the comments.<sup>27</sup> Of the 84 comment letters the Commission received, 36 letters generally were supportive of CDI/ES.<sup>28</sup>

William W. Moore, Chairman, Municipal Securities Division, Public Securities Association, to Jonathan G. Katz, dated September 20, 1990 ("PSA letter"); The National Association of Bond Lawyers (See letter from Stanley Keller, Chairman and Paul S. Maco, Director, National Association of Bond Lawyers, to Jonathan G. Katz, dated October 10, 1990 ("October, 1990 NABL Letter")); the Southern Municipal Finance Society (See letter from Robert W. Doty, Chairman, Southern Municipal Finance Society, to Jonathan G. Katz, dated September 20, 1990 ("SMFS Letter")); Doty Research and Development Company (See letter from Robert W. Doty, President, Doty Research and Development Company, to the Honorable Richard C. Breeden, Chairman, SEC, dated September 20, 1990 ("Doty Letter")); the National Federation of Municipal Analysts (See letter from the National Federation of Municipal Analysts Board of Governors Executive Committee, to Jonathan G. Katz, dated August 15, 1990 ("NFMA Letter")); the North American Securities Administrators Association (See letter from Sherwood N. Cook, Chairman, North American Securities Administrators Association Municipal Securities Committee, to Jonathan G. Katz, dated September 7, 1990 ("NASAA Letter")) and the American Bankers Association (See letter from Sarah A. Miller, Senior Government Relations Counsel, American Bankers Association Corporate Trust Committee, to Jonathan G. Katz, dated August 6, 1990 ("August, 1990 ABA Letter")).

<sup>27</sup> See letter from Diane G. Klinka, General Counsel, MSRB, to Kathryn V. Natale, Assistant Director, Division of Market Regulation, SEC, dated October 12, 1990.

<sup>28</sup> NCSHA, NASAA and NFMA Letters, *supra* note 26, letters to Jonathan G. Katz, Secretary, SEC, from Geraldine P. Kail, Senior Vice President, Sun Bank, dated August 23, 1990; Douglas J. White, Vice President, Piper Capital Management, dated September 12, 1990; Ralph Weickel, Manager—Investments, First Interstate Bank, dated July 30, 1990; Andrew R. Johnson, Vice President, Franklin Group of Funds, dated July 30, 1990; Staats M. Pellett, Jr., Senior Vice President, Bessemer Trust Company, dated August 2, 1990; Leslie Nelman, Vice President and Mark Macdonald, Director, Farmers Insurance Group of Companies, dated August 2, 1990; John P. Byram, dated July 24, 1990; Robert L. Foersterling, First Vice President, Blunt, Ellis & Loewi, dated July 16, 1990; William N. Appel, Appel & Glueck, dated July 30, 1990; Robert D. Cathcart, dated August 13, 1990; O. Delton Bennett, dated August 12, 1990; John Poignand, Vice President, Interactive Data, dated August 2, 1990; John S. Adkins, Senior Vice President and Manager, Premier Trust, dated August 13, 1990; A. Rodney Boren, Jr., Executive Vice President, Norwest Banks, dated September 28, 1990; Karen W. Brabham, Assistant Vice President and Trust Officer, South Carolina National Bank, dated August 15, 1990; Stephen J. Kenny, dated August 29, 1990; John W. Waechter, Executive Vice President, William R. Hough & Co., dated July 30, 1990; Gerald T. Grady, Jr., Branch Manager, Vice President, A.G. Edwards & Sons, Inc., undated; R. Duke McElroy, Duke McElroy & Co., dated September 19, 1990; Robert J. Beck, General Principal and Virginia Rupp Westall, Municipal Analyst, Edward D. Jones & Co., dated July 25, 1990; Richard A. Ciccarone, Senior Vice President and Director of Fixed Income Research, Blunt, Ellis & Loewi, dated July 25, 1990; Stuart Bromberg, Director—Municipal Securities, First Boston, dated July 24, 1990; William J. McCarthy, Vice President, Fitch Investors Services, Inc., dated July 25, 1990; Mark S. Borowy, Municipal Bond Analyst, Erie Insurance Group, dated August 28, 1990; and Jerry D. Fischer, Executive Director, South Dakota Health and Educational Facilities Authority;

and five generally critical of CDI/ES,<sup>29</sup> without elaboration.<sup>30</sup> Of the comment letters responding to the amendment, three express support for the CDI Pilot System proposal as amended,<sup>31</sup> two are in opposition,<sup>32</sup> and one supports the proposal as amended with specific comments for its improvement.<sup>33</sup> The specific issues raised by the commentators are discussed below.

## V. Discussion

The Commission has determined to approve the Board's proposed rule change for the eighteen month pilot period because it believes that the proposal is consistent with the Act and, in particular, section 15(b)(2)(C) of the Act, which authorizes the Board to adopt rules designed to prevent

letters to the Honorable Richard C. Breeden, Chairman, SEC, from Robert L. Adler, dated August 1, 1990; Samuel A. Ramirez, President, Samuel A. Ramirez & Co., dated July 11, 1990; David J. Master, dated August 21, 1990; Robert W. Chamberlin, Senior Vice President, Dean Witter Reynolds, Inc., dated July 17, 1990; C.M. Perkins, Associate General Manager, Salt River Project, dated July 17, 1990; H. Keith Brunnemer, Chairman, First Charlotte Corporation, dated July 9, 1990; and Walter P. Stern, Chairman, Capital Group International, dated July 10, 1990; letters to the Honorable Philip R. Lochner, Jr., Mary L. Schapiro and Edward H. Fleischman, Commissioners, SEC, from Walter P. Stern, Chairman, Capital Group International, dated July 10, 1990; and H. Keith Brunnemer, Chairman, First Charlotte Corporation, dated July 9, 1990; letter from Robert J. Martin, Vice President, Continental Asset Management, to Kathryn Natale, Assistant Director, Division of Market Regulation, SEC, dated September 21, 1990; and letter from Leon J. Karvelis, Jr., Executive Vice President, Municipal Bond Investors Assurance Corporation, to the SEC, dated July 17, 1990.

<sup>29</sup> SMFS, September, 1990 NASACT and January, 1991 NASACT Letters, *supra* note 26, and letters to Jonathan G. Katz, Secretary, SEC, from Steve Temple, Director of Finance, City of Hemet, California, dated October 19, 1990; and Lynn Hampton, C.P.A., Chief Financial Officer, Metropolitan Washington Airports Authority, dated August 2, 1990.

<sup>30</sup> These general comments were summarized in the separate summary of comments available in the public file and analyzed in Securities Exchange Act Release No. 29298.

<sup>31</sup> Letters to Jonathan G. Katz, Secretary, SEC, from John Van Gorkom, President, NCHFFA, dated November 8, 1991 ("November, 1991 NCHFFA Letter"); Sarah A. Miller, Senior Government Relations Counsel, ABA, dated November 12, 1991 ("November, 1991 ABA Letter"); and John M. Gardner, Chairman, and William J. Noth, Vice-Chairman, NABL, dated November 11, 1991 ("November, 1991 NABL Letter").

<sup>32</sup> Letters to Jonathan G. Katz, Secretary, SEC, from David R. Francesciani, Executive Vice President & General Counsel, J.J. Kenny Co., Inc., dated November 14, 1991 ("November, 1991 Kenny Letter") and Edward J. Mazur, President, NASACT, dated November 21, 1991 ("November, 1991 NASACT Letter"). The concerns raised by these commentators are addressed within the discussion. See *infra* notes 44, 45, 52, 58 and 72 and accompanying text.

<sup>33</sup> Letter from Jeffrey L. Esser, Executive Director, GFOA, to Jonathan G. Katz, Secretary, SEC, dated November 12, 1991 ("November, 1991 GFOA Letter").

fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating transactions in municipal securities and, in general, to protect investors and the public interest. The Commission believes that the CDI Pilot System will make CDI on municipal securities more readily available, resulting in increased market transparency and efficiency and investor protection.

### A. Need for the CDI Pilot System

The commentators favoring the proposal agreed that increased availability of CDI would lead to improved liquidity, lower spreads and a more efficient secondary market, and that currently such information is lacking. For example, the Public Securities Association ("PSA") stated that while the MSIL system, which contains issuer official statements, will benefit the market, official statements "present static portrayals of an issuer's condition" and that market participants require information from issuers concerning changes in their financial condition and other material information that may affect investment decisions.<sup>34</sup> The National Association of Bond Lawyers ("NABL") "believes the MSRB should be commended for addressing the need to enhance the availability of up-to-date information regarding municipal securities traded in the secondary market."<sup>35</sup> PSA believes that, the CDI Pilot System can provide the market with this necessary information about issuers, and ultimately will result in more efficient primary and secondary markets.<sup>36</sup>

Indeed, one commentator argued that the CDI Pilot System will not only benefit the market as a whole, but also will benefit issuers because "[b]etter current information should improve liquidity and reduce spreads . . . [which] should relate back and make the bonds more attractive to investors at the time of issue."<sup>37</sup> The commentator stated that "the benefit to issuers will at all times outweigh the cost to

<sup>34</sup> PSA Letter, *supra* note 26.

<sup>35</sup> November, 1991 NABL Letter, *supra* note 31.

<sup>36</sup> PSA Letter, *supra* note 26. See also November, 1991 NCHFFA Letter, *supra* note 31. As one commentator noted, it is difficult to obtain continuing disclosure information and that "[i]t is critical that the repository include this documentation as quickly as possible . . ." Letter from Peter J.D. Gordon, Managing Director, and Janet G. Albright, Vice President, T. Rowe Price, to Jonathan G. Katz, Secretary, SEC, dated September 20, 1990 ("Gordon Letter").

<sup>37</sup> Letter from James W. Perkins, Palmer & Dodge, to Jonathan G. Katz, Secretary, SEC, dated September 21, 1990.



issuers."<sup>38</sup> This commentator also believes that the system will benefit dealers in the secondary market because "[g]reater liquidity will mean more transactions."<sup>39</sup>

The American Bankers Association ("ABA") stated that it "believes that it is important that a central, national repository be established to receive disclosure information."<sup>40</sup> Generally, issuers supportive of the system believe that the CDI Pilot System will be very useful and anticipate that it will facilitate the ability of municipal issuers to use continuing disclosure documents. The issuers believe that ultimately the system will permit issuers to prepare one annual disclosure document with considerable detail that will, in turn, permit issuers to publish a briefer official statement, including descriptive information, for each bond sale.<sup>41</sup> Without commenting on whether issuers would be able to satisfy their disclosure responsibilities under the general anti-fraud provisions by referencing documents in the repository, the Commission believes that an effective repository may indeed offer the potential for such benefits.

Many issuers, on the other hand, have indicated that the CDI Pilot System is unnecessary. A number of issuers submitted virtually identical letters in which they stated that the MSIL and the CDI Pilot Systems "are overreactions to perceived problems and they should not be approved in their present form."<sup>42</sup>

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> November, 1991 ABA Letter, *supra* note 31.

<sup>41</sup> Letter from John M. Gonyou, City Finance Officer, City of Minneapolis, to the Honorable Richard C. Breeden, Chairman, SEC, dated July 13, 1990.

While the system initially will accept only short textual documents, the system may be expanded in the future to incorporate longer, more complex textual documents as the commentator describes.

<sup>42</sup> Letters to Jonathan G. Katz, Secretary, SEC, from Arthur R. Lynch, Director of Finance, City of Glendale, Arizona, dated September 21, 1990; M.E. Poole, Director, Loudoun County, Virginia, dated September 27, 1990; Ruth M. Levine, Director of Finance, City of Milford, Connecticut, dated September 18, 1990; Paul E. Haney, Director of Finance, Monroe County, New York, dated September 18, 1990; William J. Cochran, Director of Finance, City of Hartford, Connecticut, dated September 19, 1990; Ronald A. Morris, Budget and Accounting Manager, New Castle County, Delaware, dated September 20, 1990; Arthur D. Heilman, Director, Bureau of Revenue, Cash Flow and Debt, Commonwealth of Pennsylvania, dated September 24, 1990; Richard G. Hilde, City Treasurer, City of Long Beach, California, dated September 24, 1990; George Greanias, City Controller, City of Houston, Texas, dated September 24, 1990; and E.J. VanOverbeke, Finance Director/City Clerk, City of Eagan, Minnesota, dated September 28, 1990.

These same commentators believe that the Board's proposals "seek to fill an information gap that does not exist \* \* \* [and there] is no crisis in the municipal market that warrants making untimely decisions."<sup>43</sup> Other commentators also have questioned the need for the CDI Pilot System, particularly given the efforts of private sector vendors.<sup>44</sup>

The Commission believes that there are serious problems in the availability of secondary market disclosure that the system would address. Although many issuers currently prepare continuing disclosure documents, they are not widely available in the market. While all fifty states collect continuing information from local governments in some manner, it is not clear to what extent the information gathered is made available to the public.<sup>45</sup>

Currently, a number of municipal securities issuers are experiencing financial difficulties.<sup>46</sup> In such an

<sup>43</sup> *Id.* In response to the initial filing, the Government Finance Officers Association ("GFOA") asserted that although disclosure problems had been identified with information dissemination in the secondary market, it did not believe that "there is any evidence of crisis in the market that requires action immediately." September, 1990 GFOA Letter, *supra* note 28. The GFOA appears to have tempered its views, however, and in its comments on the amendment stated that "[t]he Pilot System is a step in the right direction." November, 1991 GFOA Letter, *supra* note 33.

<sup>44</sup> November, 1991 Kenny Letter, *supra* note 32; November, 1991 NASACT Letter, *supra* note 32; November, 1991 NABL Letter, *supra* note 31; and November, 1991 GFOA Letter, *supra* note 33.

<sup>45</sup> In July 1991, the National Association of State Auditors, Comptrollers and Treasurers ("NASACT") published the findings of a study it conducted in cooperation with the GFOA and the states of California, Texas, North Carolina and Ohio concerning information collected by each state about the securities issued by governmental issuers within the state. In its report, NASACT acknowledged that in the four states studied, no central authority maintained information for all levels of governmental issuers, but recommended expanding the study before drawing any conclusions about the availability or lack thereof of information needed by the municipal securities markets. NASACT, *The Availability of Continuing Information About State and Municipal Bond Issues: A Study of Four States* 37 (July 1991). NASACT has indicated that it has begun the second phase of its study, involving an additional ten states, and plans to complete its work by the summer of 1992. November, 1991 NASACT Letter, *supra* note 32.

The Commission applauds NASACT's efforts to determine the availability of municipal securities information on a state-by-state basis. However, the commentators supporting the proposal have made clear that the need for a single national, centralized source of secondary market information exists now. The Commission agrees with these commentators and believes the Pilot System can augment the efforts of the states, rather than replace them.

<sup>46</sup> *E.g.*, *Once Upon a Time*, a Muni was a Muni was a Muni, *Bus. Wk.*, Dec. 31, 1990, at 120; *The New Junk?*, *Barron's*, Oct. 29, 1990, at 10, col. 1; *Many Tax-Free Bonds are Going into Default in*

environment, disclosure mechanisms become especially important to investors and potential investors in these securities.<sup>47</sup> The Commission believes that the CDI Pilot System could be an important mechanism to enhance the timeliness and availability of disclosure information in the market.

Moreover, the Commission believes that there is a need for better dissemination of such information.<sup>48</sup> As discussed above, market participants currently price transactions based on the assumption that information may be incomplete or erroneous, thus leading to inaccurate pricing and inefficiency in the market. The Commission believes that the proposed system would result in a more liquid and more efficient secondary market for municipal securities, because timely information would be available to all market participants on an equal basis.<sup>49</sup>

Colorado Land Bust, *Wall St. J.*, Dec. 7, 1990, at A1, col. 6.

<sup>47</sup> Certainly, at least since the financial crises of the Washington Public Power Supply System ("WPPSS") and New York City, the benefits of improved disclosure of issuer information has been painfully apparent. The staff of the Commission investigated the New York City fiscal crisis and the WPPSS default and concluded in both instances that serious questions were raised concerning whether the disclosure documents of these issuers adequately disclosed significant facts about the financial condition of the issuers and about their ability to meet their obligations. "The Staff Report raises serious questions concerning whether official statements for Supply System bonds adequately disclosed significant facts related to the [WPPSS projects]." Report of the Securities and Exchange Commission on Regulation of Municipal Securities (September 22, 1988), at 7. With respect to the New York City crisis, "the Commission staff prepared a report, which concluded that New York City had employed budgetary, accounting and financing practices that distorted its true financial condition." *Id.* at 9, 10. See also Staff Report on the Investigation in the Matter of Transactions in the Washington, Public Power Supply System Securities (1988) and Securities and Exchange Commission Staff Report on Transactions in Securities of the City of New York, Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affs., 95th Cong., 1st Sess. (Comm. Print 1977). In the Commission's final report on the New York City crisis, the Commission acknowledged that certain voluntary efforts to improve disclosure had been taken but also noted that the quality of disclosure varied widely. See Securities and Exchange Commission Final Report in the Matter of Transactions in the Securities of the City of New York, Committee on Banking, Housing and Urban Affs., 96th Cong., 1st Sess. (Comm. Print 1979).

<sup>48</sup> *Once Upon a Time*, a Muni was a Muni was a Muni, *Bus. Wk.*, Dec. 31, 1990, at 120; *The New Junk?*, *Barron's*, Oct. 29, 1990, at 10, col. 1; and *A Better Break for Investors?*, *Forbes*, Sept. 3, 1990, at 273.

<sup>49</sup> Another issuer is concerned that small issuers could be disproportionately burdened by interim disclosure requirements and that "it is far preferable to allow buyers in the secondary market to request information concerning the current financial position and health of the \* \* \* [issuer]" at

Continued



Furthermore, greater availability of CDI will reduce the risk of sales practice fraud and manipulation in the municipal market by making investors more informed and better able to detect such practices.<sup>50</sup>

#### B. Competition With Private Vendors

Having concluded that the CDI Pilot System will have a substantial beneficial impact on the market, the Commission must assess its effect on competition. Section 15B(b)(2)(C) of the Act requires that, before approving Board rules, the Commission finds that the proposed rules do not "impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title."<sup>51</sup> The Commission has examined closely the potential anti-competitive effect of the Board's proposal and has determined that the proposed rule change does not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

One vendor of municipal securities information expressed concern that: (1) Competition should be encouraged in the collection, as well as dissemination, of municipal securities information; (2) the CDI Pilot System will compete with comparable existing private services; and (3) if the Commission approves the CDE Pilot System, it should also provide incentives to enhance competition in the collection of CDI.<sup>52</sup> Another commentator is concerned that if issuers provide their current reports to the Board's repository, they may stop providing these documents directly to investors.<sup>53</sup> The commentator suggested that an incentive should be developed to encourage these issuers to continue to disseminate their current reports voluntarily and broadly.

The system is not intended to replace the dissemination efforts of issuers, trustees and underwriters but to supplement them and act as an archive for long-term storage of and access to

such documents.<sup>54</sup> The system should increase information dissemination by permitting information to reach a broader audience in a cost-effective manner. The Commission expects issuers and trustees to continue to provide documents to investors consistent with current practice.

The Commission addressed the issue of competition with private vendors in its approval of the MSIL system. At that time, the Commission stated that,

The Commission believes that [it] will foster competition in the dissemination of municipal securities information by reducing the cost of entry into the market \* \* \*. Thus, all vendors will have equal access to these public documents and will be able to develop whatever information products they believe will be marketable.

Some of the commentators appear to be operating on the basic misassumption that the Commission's action today will require that information be channelled exclusively through the MSIL system. Despite the claims of certain commentators, the Board will not have a monopoly on the information contained in MSIL \* \* \*. MSIL should, therefore, be a source of documents to new entrants to the market without adversely affecting the ability of the existing vendors to acquire those statements directly \* \* \*. Thus, rather than monopolizing the field, MSIL will simply provide raw data which will increase the ability of vendors to compete in the provision of value-added services.<sup>55</sup>

The Commission believes that these statements are equally applicable to the CDI Pilot System. The Commission believes that, despite the Board's collection efforts, the vendors' long-established relationships with underwriters and issuers will remain in place, and issuers and trustees will not cease providing information to the vendors simply because the CDI Pilot System is available.

The Commission recognizes the valuable contribution the vendors provide, and believes that the CDI Pilot System will supplement their services. The CDI Pilot System should benefit the private vendors operating the NRMSIRs by providing them with an additional source of CDI, allowing them to develop innovative new value-added products for the market.

In September of 1990, J.J. Kenny Co., Inc. ("Kenny") introduced the KENNYALERT system, which supplies condensed versions of market-sensitive information on-line and free of charge to

subscribers to other Kenny services.<sup>56</sup> In addition, Bloomberg Financial Markets and The Bond Buyer have agreed to accept CDI. Bloomberg has stated it will disseminate the information through the Bloomberg network and The Bond Buyer has indicated that it will transmit notices via its Munifacts news wire service.<sup>57</sup> The Board's CDI system may prove to be a valuable source of documents for these and other vendors who may choose to offer similar services. Indeed, the system may increase competition in the dissemination of CDI, thus making the information more widely available on an equal basis.<sup>58</sup>

#### C. Technology

Many commentators expressed concern that the CDI/ES system would accept only electronically transmitted CDI, and requested that the Board consider accepting paper submissions.<sup>59</sup> A broad base of commentators expressed support for both paper and electronic formats and urged the Board to develop both systems.<sup>60</sup> One trustee believes that electronic submission is "highly desirable" for time-sensitive information, but that this should not be the required method of submission for periodic information, such as audits and annual reports.<sup>61</sup> He believes that "the

<sup>50</sup> See Kenny Unveils System for Relaying Data From Issuers, Trustees to Secondary Market, Bond Buyer, Aug. 2, 1990.

<sup>51</sup> Bankers Release Disclosure Rules: Market Expects Slow Reaction, Bond Buyer, Oct. 24, 1991.

<sup>52</sup> Kenny suggest that if the Commission approves the CDI Pilot Program: (1) it should provide an incentive similar to Rule 15c2-12 to encourage issuers to provide CDI to the NRMSIRs; and (2) it could amend Rule 2a-7 to restrict tax exempt money market funds investing in municipal paper of issuers that do not pledge to provide secondary market disclosure to one of the NRMSIRs. November, 1991 Kenny Letter, *supra* note 32. These Commission rules are not within the scope of the instant rule filing.

<sup>53</sup> For example, GFOA stated that there is a need for hard copy submission. GFOA also stated that it is "not opposed to a paperless system," but believes that "any system must be cost-effective." September, 1990 GFOA Letter, *supra* note 26. See also Mazur Letter, *supra* note 49. The National Council of Health Facilities Finance Authorities suggested that the Board consider ways of accepting non-electronic, time-sensitive continuing disclosure information from sources that do not have the computer capacity envisioned by the CDI/ES system. September, 1990 NCHFFA Letter, *supra* note 26.

<sup>54</sup> August, 1990 ABA Letter, *supra* note 26, and letters to Jonathan G. Katz, Secretary, SEC, from Jeffrey J. Powell, Vice President, The First National Bank of Chicago, dated July 31, 1990; Thomas B. Martin, Esq., Circle Consulting Group, Inc., dated July 24, 1990; and Anthony A. Guthrie, Senior Vice President, Citizens and Southern Trust Company, dated August 24, 1990.

<sup>55</sup> Letter from George W. Coombe, Jr. Executive Vice President and General Counsel, Bank of America, to Jonathan G. Katz, Secretary, SEC, dated August 24, 1990 ("Coombe Letter").

the time that purchase is being contemplated, rather than force such small entities to provide ongoing disclosure on a routine and scheduled basis \* \* \*. Letter from Edward J. Mazur, C.P.A., Comptroller, Commonwealth of Virginia, to Jonathan G. Katz, Secretary, SEC, dated September 24, 1990 ("Mazur Letter"). The Commission emphasizes that the system is voluntary, and that small issuers may continue to provide disclosure information to potential investors in any manner that they deem appropriate.

<sup>50</sup> The Act provides the MSRB with authority to promulgate rules to "prevent fraudulent and manipulative acts and practices \* \* \*." Section 15B(b)(2)(C) of the Act.

<sup>51</sup> Section 15B(b)(2)(C) of the Act. Cf. *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085 (D.C. Cir. 1978); *Clement v. SEC*, 674 F.2d 641 (7th Cir. 1982).

<sup>52</sup> November, 1991 Kenny Letter, *supra* note 32.

<sup>53</sup> Doty Letter, *supra* note 26.

<sup>54</sup> Furthermore, the ABA Disclosure Guidelines allow for the transmission of information to other entities, such as private vendors and rating agencies. See American Bankers Association Corporate Trust Committee, Disclosure Guidelines for Corporate Trustees (October 1991).

<sup>55</sup> Securities Exchange Act Release No. 29298 (June 13, 1991), 56 FR 28194, 28200.



risk of transcription errors make electronic transmission an untenable alternative to submission of hard copy in all but the most time-sensitive situations."<sup>62</sup>

NABL believes that an "electronically exclusive system \* \* \* could in fact be costly and inefficient. Existing means of providing information, such as Munifacts and the Dow-Jones wire, allow immediate dissemination of information to the marketplace, without the need or cost of transcribing information to electronic media."<sup>63</sup>

In response to these concerns and those raised by the Commission at the June 6 meeting, the MSRB has revised the proposal to accept paper and facsimile transmissions, as described above. Several commentators have indicated that this change represents an improvement over the CDI/ES system.<sup>64</sup>

The Commission recognizes that because the system is designed primarily for time-sensitive information, electronic submission and dissemination is an attractive method to ensure the accuracy and quick turnaround necessary for such information in a cost-effective manner. However, to accommodate as many issuers as possible, the Commission agrees with these commentators that the system should also accept paper submission.<sup>65</sup>

<sup>62</sup> *Id.*

<sup>63</sup> October, 1990 NABL Letter, *supra* note 26. Munifacts is a news wire service operated by American Banker-Bond Buyer that provides real-time market information on the municipal and corporate bond markets. The Dow-Jones wire similarly provides information on the securities markets.

As discussed above, commentators indicated that in many cases CDI did not become widely disseminated for weeks after becoming available. The Commission believes that the CDI Pilot System, by providing a centralized system for receiving CDI, will improve the scope and reliability of systems such as Munifacts and the Dow-Jones wire, by providing additional information for such value-added services to distribute.

In addition, one vendor questioned whether the proposed technology is "really necessary in order to provide improved disclosure to the marketplace." Letter from J. Kevin Kenny, President & Chief Executive Officer, J.J. Kenny Co., Inc., to Jonathan G. Katz, Secretary, SEC, dated September 24, 1990 ("September, 1990 Kenny Letter").

<sup>64</sup> November, 1991 ABA Letter, *supra* note 31; and November 1991 GFOA Letter, *supra* note 33.

<sup>65</sup> NABL expressed concern that dissemination of CDI submitted by facsimile or mail will lag behind electronic filings to an unacceptable degree. November, 1991 NABL Letter, *supra* note 31. But see November, 1991 ABA Letter, *supra* note 31. The Commission believes this possibility cannot be avoided in the implementation of a system that accepts submissions in many formats. The MSRB's experience with system processing queues and time lags should be taken into consideration by the MSRB in designing changes to the system or in proposing the facility for permanent approval.

The Commission believes that the CDI Pilot System, as amended, meets these concerns and will allow both the electronic and paper systems to proceed in tandem. The Commission believes the CDI Pilot System will provide time-sensitive secondary market information to the public in a timely and accurate manner.

#### D. Authority

The Commission believes that the Board's plans to create the CDI Pilot System are designed to further the purposes of the Act by encouraging greater dissemination of continuing information regarding the terms of municipal securities and the financial position of municipal issuers. The Act provides the Board authority to effectuate certain purposes; among them,

to prevent fraud and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in the general, to protect investors and the public interest.<sup>66</sup>

Enhanced information regarding municipal securities terms and municipal issuers will result in greater efficiency and fairness in the market and will protect investors and the public interest. The CDI Pilot System will provide a central source for CDI for dealers, which will help them comply with MSRB fair practice rules in their transactions with customers and thus should prevent fraudulent and manipulative acts and practices and should enhance investor protection. In addition, readily available, up-to-the-minute information should enhance the pricing efficiency of the markets. Finally, the CDI Pilot System will also promote just and equitable principles of trade and foster cooperation and coordination with persons engaged in transactions in municipal securities by providing broker-dealers with an easier means to check continuing information about municipal securities issuances before making recommendations to customers and engaging in transactions. The Commission thus believes that the proposed rule change represents a proper exercise of the Board's statutory authority, pursuant to section 15B(b)(2)(C) of the Act.<sup>67</sup>

<sup>66</sup> Section 15B(b)(2)(C) of the Act.

<sup>67</sup> For the additional reasons discussed in the order approving the MSIL system, the Commission believes the MSRB has the authority, under section

Some commentators expressed concern over who would dictate the form, content and timing of the CDI sent the system. This issue is of particular sensitivity to the issuer community. Some commentators noted that this responsibility rests with the issuer and trustee communities and advised that these market participants adhere to guidelines developed for the industry.<sup>68</sup> Another commentator believes that current disclosure guidelines adopted by the GFOA and others have "more than adequately served the needs of those who purchase \* \* \* debt instruments."<sup>69</sup> The commentator acknowledged, however, "that there still may be areas of deficient disclosure uniformity and quality that could be addressed by improved information guidelines."<sup>70</sup> Another commentator suggested that the CDI Pilot System incorporate the ABA's proposed draft disclosure guidelines but noted that, as designed, the system would not accept the level of detail required by the market.<sup>71</sup> Other commentators echoed

15B(b)(2)(C) of the Act, to create the CDI Pilot System. See Securities Exchange Act Release No. 29298 (June 13, 1991), 56 FR 28194. The discussion of authority in that order is hereby incorporated by reference.

<sup>68</sup> GFOA stated that "[t]here is the widely held view that improvements need to be made to secondary market disclosure" and noted that there are many industry efforts underway to offer guidance to issuers and trustees on the type of continuing disclosure information that should be disclosed, and the timing of such disclosure. September, 1990 GFOA Letter, *supra* note 26. See also September, 1990 Kenny Letter, *supra* note 63, and letter from Lynn Hampton, C.P.A., Chief Financial Officer, Metropolitan Washington Airports Authority, to Jonathan G. Katz, Secretary, SEC, dated September 24, 1990.

<sup>69</sup> Mazur Letter, *supra* note 49.

<sup>70</sup> *Id.*

<sup>71</sup> The commentator suggested that the Board should incorporate and mandate the same disclosure that the ABA's Corporate Trust Committee recommended in its recently proposed draft disclosure guidelines. The commentator also suggested that the amendments to MSRB rule G-36 should address the "concept of aftermarket availability of information." It noted that its primary concern is that the creation of an additional voluntary repository inadvertently may lead to diminished disclosure. In support of this position, the commentator stated that the "level of detail desired by some market participants will be lost" if the Board does not incorporate the ABA's disclosure requirements, and that only "the creation of a single mandatory and accessible repository which is prepared to accept the greatest level of detail is fair to both bondholders and other secondary market participants." Letter from Steve Permut, Municipal Credit Analyst, and Casey Colton, CPA, Municipal Credit Analyst, Benham Capital Management Group, to Jonathan G. Katz, Secretary, SEC, dated August 13, 1990.



the latter concern by arguing that the three-page limit is unduly restrictive, and that documents such as issuer financial statements would not fit within the system's length restrictions.<sup>72</sup>

The Commission understands that the Board intends to develop a CDI system that is flexible to accommodate documents prepared in accordance with industry guidelines; whatever their final form may be. Moreover, the Commission notes that there will be no requirement for any issuer or trustee to submit information to the system.

While certain format standards for submissions must be established by CDI providers prior to incorporation in the system, the Commission is sensitive to concerns that the Board not dictate the content of disclosure by municipal issuers. Indeed, the Board is prohibited by section 15B(d)(2) of the Act from taking such action, and the Commission's decision to approve the CDI Pilot System specifically is conditioned on the Board's strict adherence with the limitations of that section. At the same time, however, the Board has offered to work with issuers and trustees to arrive at formats for electronic files that can be accepted and disseminated by the CDI Pilot System. The Board has formed a MSIL System Advisory Committee representative of all sectors of the municipal industry, including issuers, to consider operational issues. The Board has committed that it will consider the committee's views when making decisions about the system.<sup>73</sup> The Commission's approval specifically is premised on the Board working closely with issuers, their agents and the MSIL System Advisory Committee to determine what they want to disclose voluntarily and to accommodate these

disclosures in an acceptable format. The Commission also requests that the Board report to the Commission in detail regarding the activities of the Advisory Committee, including any proposals or recommendations of the Committee.<sup>74</sup>

By incorporating short, textual documents now, the system can be assured to integrate many of the most time-critical disclosure documents immediately.<sup>75</sup> After initiating operations, the Board may expand the system to incorporate longer, more complex textual documents, including charts, tables and images. It should be noted that the system is meant to serve as a pilot, and after the MSRB establishes a track record for handling shorter documents, it will be in a better position to design modifications to the system to accept longer documents. The Commission strongly encourages the Board to integrate longer and more diverse documents into the CDI System as quickly as possible.

Other commentators, citing the efforts of industry groups to standardize and improve continuing disclosure, recommended either delaying or abandoning the CDI Pilot System.<sup>76</sup> The Commission believes that delaying the operation of the CDI Pilot System until all questions on form and content of such disclosures have been resolved, however, would serve only to delay important information reaching the market in a fair and equitable manner. Moreover, the Board has designed the system to be flexible enough to accommodate CDI under whatever guidelines the various groups ultimately adopt.<sup>77</sup>

<sup>74</sup> The GFOA has proposed that the CDI Pilot System be modified to provide for a "utilization phase" at the beginning, which would, in an effort to help state and local issuers better understand the financial information distribution process, develop and disseminate: (1) Basic informational brochures about continuing disclosure; (2) handbook materials describing continuing disclosure recommendations developed by issuers, investors and advisors to issuers; and (3) instructional aid materials for educational presentations on secondary market disclosure. November, 1991 GFOA Letter, *supra* note 33. The Commission applauds the GFOA proposal and would encourage GFOA, their members and other interested organizations to work closely with the MSRB to promote secondary market disclosure.

<sup>75</sup> Submitters could also use a three-page notice to announce the issuance and availability of or to summarize a longer document.

<sup>76</sup> One commentator recommended that "[r]ather than immediately proceeding with the . . . continuing disclosure information . . . , it would appear that a trial period of at least six months to test and implement the first phase of the library would be more appropriate." Mazur Letter, *supra* note 49.

<sup>77</sup> One commentator also believes that electronic submission should not be required for redemption notices that are submitted to one or more national services pursuant to the ABA's guidelines. Coombe

#### E. Fiduciary Concerns

Several trustees expressed concern that releasing information through the CDI Pilot System may conflict with their fiduciary duties to bondholders.<sup>78</sup> Specifically, these commentators objected to releasing potentially significant information in the market before existing bondholders received the same information. One trustee, although supportive of the MSIL system, is concerned with the protection of individual bondholders and believes that the filing of information should be mandatory, rather than voluntary, to protect these individuals.<sup>79</sup> Another trustee shares this concern but recommended, alternatively, that a 48 to 72-hour embargo be placed on the release of information through the CDI Pilot System from the time the trustee mails the notices to bondholders to allow time for delivery before the information reaches the general public.<sup>80</sup> Some concern was expressed that trustees could be deemed to be furnishing "inside information" to certain parties.<sup>81</sup>

More fundamentally, NABL is concerned that trustees are not and should not be in the position of undertaking independent disclosure responsibilities and that imposition of disclosure roles on intermediate parties, such as trustees, increases the likelihood of providing inaccurate and incomplete information to the investing public.<sup>82</sup> The PSA took a similar position, arguing that greater emphasis should be placed on the issuer's role in disseminating information under a trust indenture to the public.<sup>83</sup>

Letter, *supra* note 61. The CDI Pilot System is voluntary, and as such, electronic submission is not required for any documents.

<sup>78</sup> NABL also is concerned that the trustee's role in protecting bondholders' interests "could be eroded if conflicting obligations are imposed on trustees." October, 1990 NABL Letter, *supra* note 26.

<sup>79</sup> Letter from Charles O. Trotter, Vice President and Senior Trust Officer, Central Bank of the South, to Jonathan G. Katz, Secretary, SEC, dated August 7, 1990 ("Trotter Letter").

<sup>80</sup> Coombe Letter, *supra* note 61.

<sup>81</sup> Letter from G. Richard Retto, Vice President, Trust Division, National Bank of Detroit, to Jonathan G. Katz, Secretary, SEC, dated September 7, 1990.

<sup>82</sup> October, 1990 NABL Letter, *supra* note 26. NABL has also suggested that to give investors a better idea of the reliability of information being submitted, trustees be permitted to state whether or not they are submitting information on behalf of issuers in establishing a submitter file with the MSRB, or otherwise be permitted to describe the source of the information. November 1991 NABL Letter, *supra* note 31. If a trustee wishes to state that it is submitting information on behalf of the issuer, it may so state in the short description of the document on the cover sheet or in the text of the document itself.

<sup>83</sup> PSA Letter, *supra* note 26.

<sup>72</sup> November, 1991 NABL Letter, *supra* note 31; and November, 1991 GFOA Letter, *supra* note 33. See also November, 1991 NASACT Letter, *supra* note 32; and November, 1991 ABA Letter, *supra* note 31. The American Banker-Bond Buyer ("AB-BB") believes that the Board's proposal "employs too broad a definition of CDI . . . [and] is needlessly restrictive in limiting CDI to electronic submissions." Letter from Joseph V. Riccobono, Executive Vice President, Securities Group, AB-BB, to Jonathan G. Katz, Secretary, SEC, dated September 21, 1990. With respect to electronic submissions, the MSRB has addressed this concern in the revised CDI Pilot System, discussed *supra*.

<sup>73</sup> Letter from Diane G. Klinke, General Counsel, MSRB, to Kathryn V. Natale, Assistant Director, Division of Market Regulation, SEC, dated October 12, 1990. NABL complained that the MSRB did not utilize the MSIL Advisory Committee in formulating the CDI Pilot System proposal. NABL stated that it "believes that the MSIL Advisory Committee serves a critical need in developing appropriate measures to address the concerns of all segments of the marketplace, and should play a pivotal role in that process." November, 1991 NABL Letter, *supra* note 31. See also November, 1991 GFOA Letter, *supra* note 33.



The Commission is sensitive to the concerns of the commentators. Nevertheless, the Commission strongly supports the efforts of the ABA Corporate Trust Committee and other industry groups to promote secondary market disclosure. The Commission believes that because the CDI Pilot System is voluntary, each CDI provider may determine the content and appropriate timing of submissions. Thus, issues raised by the commentators, while significant, are beyond the scope of the MSRB's proposal. Moreover, the Commission notes that the system may offer substantial benefits for trustees and bondholders.

#### F. Costs

Commentators expressed concern about the costs of the CDI Pilot System both to issuers and to investors. PSA, although supportive of the CDI Pilot System, is concerned about the costs of the project, particularly the costs to smaller regional dealers in accessing the CDI Pilot System.<sup>84</sup> Similarly, the ABA stated that because the cost of a modem needed to send information to CDI/ES would be approximately \$200-500, it is possible that trustees and issuers may find the costs "not to be insignificant."<sup>85</sup> Another commentator is concerned that the individual bondholders have been overlooked, and questioned whether these individuals will be willing or able to pay the subscription fee and obtain a personal computer with a dedicated modem-to-modem link to receive pertinent information.<sup>86</sup> In addition to concern over the Board's current cost estimates, one commentator expressed concern that because the CDI fees will be cost-based, should demand decline, the price of subscribing could become prohibitively high.<sup>87</sup>

With respect to investors, the Board has stated that it anticipates that private-sector information vendors will subscribe to the system and repackage the information for sale to individual investors for significantly less than the subscription fee.<sup>88</sup> The concerns of the issuer community, as expressed by the ABA, should have been met by the revised CDI Pilot System, which permits paper and facsimile submissions. Finally, the Commission believes that any costs entailed in the development

and operation of the CDI Pilot System are outweighed by the benefits resulting from the system.

#### G. Terms for the Evaluation of the Pilot

Before the system becomes operational, the Board must: (1) file the annual subscription fee for the service with the Commission for review under rule 19b-4; and (2) file any changes to the system with the Commission for review under rule 19b-4.

As discussed above, the Commission's approval is premised on the Board working closely with issuers, their agents and the MSIL System Advisory Committee to accommodate the needs of these constituencies in developing formats for submissions. The Board also should consider the suggestions of these groups in determining how to expand the pilot at each phase and in formulating any proposal for permanent approval of the CDI System.

The Commission expects the MSRB to submit a detailed report on the integrity and capacity of the CDI Pilot System prior to commencement of operations. In addition, the Board will report to the Commission on each phase after it is completed, and on the pilot program as a whole at the end of the pilot period. These reports should discuss: (1) Volume data, including number of issuers and trustees submitting reports to date and number of reports submitted to date; (2) demand for the service, including number of subscribers; (3) usage of the PAF for obtaining CDI information; (4) any problems that have developed, including processing queues and time lags, and how the Board has addressed each; (5) any suggestions from users or potential users for improvements; (6) funds expended in operating the system during the phase; (7) efforts or plans to expand the system to include longer and more diverse CDI; and (8) the activities of the MSIL Advisory Committee, including any proposals or recommendations of the Committee.

Any changes or requests for permanent approval would be filed with the Commission for approval under Rule 19b-4. In evaluating a request for permanent approval, the Commission would consider: (1) The Board's performance in operating the Pilot System, including system integrity and reliability, compatibility of electronic and paper/facsimile systems, and how well processing queues and time lags have been addressed; and (2) whether the Board has made sufficient progress toward expanding the system to include longer and more diverse CDI.

#### VI. Conclusion

The Commission has examined the Board's proposal in light of the standards cited in section 15B(b) of the Act and concludes, for the reasons stated above, that the proposed rule change is consistent with the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change described above be, and hereby is, approved for the eighteen month pilot period, ending October 6, 1993.

By the Commission.  
Margaret H. McFarland,  
Deputy Secretary.  
[FR Doc. 92-8382 Filed 4-9-92; 8:45 am]  
BILLING CODE 8010-01-M

[File No. 1-10445]

#### Issuer Delisting; Application to Withdraw from Listing and Registration; (Circuit Systems, Inc., Common Stock, No Par Value)

April 6, 1992.

Circuit Systems, Inc. ("Company") has filed an application with the Securities and Exchange Commission, ("Commission") pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified security from listing and registration on the Boston Stock Exchange, Inc. ("BSE" or "Exchange").

The reasons alleged in the application for withdrawing this security from listing and registration include the following:

According to the Company, its Common Stock had been listed for trading on the National Association Securities Dealers Automated Quotation National Market System ("NASDAQ/NMS") and became listed for trading on the BSE on January 26, 1990.

In making the decision to withdraw its Common Stock from listing on the BSE, the Company considered the direct and indirect costs and expenses attendant to maintaining the dual listing of its Common Stock on the NASDAQ/NMS and the BSE. The Company does not see any particular advantage in the dual trading of its Common Stock and believes that dual listing could possibly fragment the market for its Stock. Additionally, the Company believes that the NASDAQ/NMS provides the Company's shareholders with a market system that adequately accommodates the trading volume in the Company's Common Stock.

Any interested person may, on or before April 27, 1992 submit by letter to

<sup>84</sup> PSA expressed "hope that competition among private information vendors will help keep these costs to a minimum." PSA Letter, *supra* note 26.

<sup>85</sup> August, 1990 ABA Letter, *supra* note 26.

<sup>86</sup> Trotter Letter, *supra* note 79.

<sup>87</sup> Gordon Letter, *supra* note 36.

<sup>88</sup> We also note that the price of \$.20 per page for individual copies of CDI documents is reasonable.



the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchanges and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 92-8285 Filed 4-9-92 8:45 a.m.]

BILLING CODE 8010-01-M

[File No. 1-2958]

**Issuer Delisting; Application to Withdraw From Listing and Registration; (Hubbell Inc., Class A Common Stock, \$.01 Par Value; Class B Common Stock, \$.01 Par Value)**

April 6, 1992.

Hubbell Incorporated ("Company") has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the above specified securities from listing and registration on the American Stock Exchange, Inc. ("Amex").

The reasons alleged in the application for withdrawing these securities from listing and registration include the following:

In addition to being listed on the Amex, the Company's common stock is listed on the New York Stock Exchange, Inc. ("NYSE"). The Company's stock commenced trading on the NYSE at the opening of business on March 25, 1992 and concurrently therewith such stock was suspended from trading on the Amex.

In making the decision to withdraw its common stock from listing on the Amex, the Company considered the direct and indirect costs and expenses attendant on maintaining the dual listing of its common stock on the NYSE and on the Amex. The Company does not see any particular advantage in the dual trading of its stock and believes that dual listing would fragment the market for its common stock.

Any interested person may, on or before April 27, 1992 submit by letter to the Secretary of the Securities and

Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the exchanges and the terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 92-8283 Filed 4-9-92; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-25510]

**Filings Under the Public Utility Holding Company Act of 1935 ("Act")**

April 3, 1992.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the applicant(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by April 27, 1992 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requires will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

**Southwestern Electric Power Company (70-7934)**

Southwestern Electric Power Company ("SEPCO"), 428 Travis Street,

Shreveport, Louisiana 71101, an electric public-utility subsidiary company of Central and South West Corporation, a registered holding company, has filed a post-effective amendment under sections 6(a) and 7 of the Act and Rule 50(a)(5) thereunder to its declaration originally filed under sections 6(a) and 7 of the Act and Rule 50 thereunder.

By Commission order dated March 20, 1992 (HCAR No. 25497), SEPCO was authorized to issue and sell first mortgage bonds ("New Bonds") in an aggregate principal amount up to \$40 million, in one or more series, from time-to-time through December 31, 1993. The New Bonds will have maturities of not less than five nor more than thirty years. SEPCO was authorized to sell the New Bonds pursuant to the competitive bidding requirements of Rule 50 or in accordance with the alternative bidding procedures authorized by the Statement of Policy dated September 2, 1982 (HCAR No. 22623).

SEPCO now requests authorization to issue the New Bonds pursuant to a deviation from the Commission's Statement of Policy Regarding First Mortgage Bonds Subject to the Public Utility Holding Company Act of 1935 (HCAR No. 13105, February 16, 1956, as amended by HCAR No. 16369, May 8, 1969) ("SOP") to the extent that the redemption provisions, sinking fund provisions and the limitation on common stock dividends deviate from the SOP. The terms of the New Bonds may provide that they will either (a) not be redeemable at SEPCO's option for a period of up to a maximum of 15 years, or (b) be issued with a refunding restriction of up to 15 years. The refunding restriction would prevent SEPCO from refunding the New Bonds with lower cost debt securities for a specified period not exceeding 15 years. In addition, the terms of the New Bonds may or may not provide for a sinking or retirement fund or for a limitation on dividends.

SEPCO also requests authorization to issue the New Bonds by negotiating their terms and conditions under an exception from the competitive bidding requirements of Rule 50 under subsection (a)(5) thereunder. SEPCO may begin negotiating with potential underwriters regarding the terms and conditions of the New Bonds.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 92-8324 Filed 4-9-92; 8:45am]

BILLING CODE 8010-01-M



## DEPARTMENT OF TRANSPORTATION

## Federal Highway Administration

Environmental Impact Statement:  
Marathon County, WI

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed bridge corridor project in Marathon County, Wisconsin.

**FOR FURTHER INFORMATION CONTACT:**

Ms. Jaclyn Lawton, Environmental Coordinator, Federal Highway Administration, 4502 Vernon Boulevard, Madison, Wisconsin 53705. Telephone: (608) 264-5967.

Carol Cutshall, Wisconsin Department of Transportation, Office of Environmental Analysis, 4802 Sheboygan Avenue, Madison, Wisconsin 53705. Telephone: (608) 266-9626.

William Poston, SEC Donohue Inc. (f/k/a/ Donohue & Associates, Inc.), 6325 Odana Road, Madison, Wisconsin 53719. Telephone: (608) 271-1004.

Donald Gutkowski, Wisconsin Department of Transportation, McCleary Bridge Project Supervisor, 1681 Second Avenue South, P.O. Box 8021, Wisconsin Rapids, Wisconsin 54495. Telephone: (715) 421-8313.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Wisconsin Department of Transportation (WDOT), will prepare an Environmental Impact Statement (EIS) on proposed improvements to the Rib River (McCleary) Bridge and CTH N from Robin Lane in the Town of Rib Mountain to Thomas Street in the City of Wausau, in Marathon County, Wisconsin. The purpose of this project is to conduct a corridor study and an environmental analysis for a new structure and associated potential relocation of CTH N.

The existing bridge and roadway are 2-lane facilities. An engineering study is currently underway to determine the traffic and roadway system needs of the community. The EIS will assess the need, location, and environmental issues of alternatives, including: (1) No build; (2) existing corridor; and (3) relocated corridor northwest of the existing McCleary Bridge. Major issues identified to date include potential impacts to commercial and residential areas, wetlands, floodplains, fish and wildlife, and Lake Wausau.

Information describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed, or are known to have interest in this proposal.

Two public informational meetings will be held during data gathering and development of alternatives. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing. A scoping meeting was held to discuss the project at the Town Hall in Rib Mountain, Wisconsin, on February 5, 1992.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the agencies at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding Intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: April 3, 1992.

**Robert Cooper,**

*District Engineer, Madison, Wisconsin.*

[FR Doc. 92-8359 Filed 4-9-92; 8:45 am]

BILLING CODE 4910-22-M

Environmental Impact Statement;  
Milwaukee County, WI

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for highway and other infrastructure work proposed for a new Milwaukee Brewers Stadium in Milwaukee County, Wisconsin. The project will include federal aid highway work.

**FOR FURTHER INFORMATION CONTACT:**

Ms. Jaclyn Lawton, P.E. Environmental Coordinator, Federal Highway Administration, 4502 Vernon Boulevard, Madison, Wisconsin 53705-4906. Telephone: (608) 264-5967.

**SUPPLEMENTARY INFORMATION:** The FHWA and the Wisconsin Department of Transportation will prepare an Environmental Impact Statement (EIS) on a proposal to improve Interstate

Highway 94 (I 94) and the United States Highway 41 (USH 41) in Milwaukee County, Wisconsin. The proposed improvement involves reconstruction of existing I 94 between Hawley Road and USH 41 a distance of about 1 mile, and reconstruction of USH 41 between National Avenue and I 94 a distance of ¾ mile. The EIS will also address the other infrastructure improvements to accommodate a new sports and entertainment stadium in the vicinity of the current Milwaukee Brewers Stadium, home of the Milwaukee Brewers baseball club.

Improvements are considered necessary to provide for the safe and efficient movement of traffic and to accommodate a new stadium. Alternatives under consideration include:

- (1) Taking no action;
- (2) A stadium and roadway improvement concept identified as Alternative 2A, which was developed during a value engineering/value planning study;
- (3) Any other identified reasonable site configurations meeting the overall needs of the project.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. A series of public meetings will be held in the vicinity of the project during 1992. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and the hearing. The draft EIS will be available for public and agency review and comment prior to the public hearing. A formal scoping meeting has not been scheduled.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: April 3, 1992.

**Robert W. Cooper,**

*District Engineer, Madison, Wisconsin.*

[FR Doc. 92-8360 Filed 4-9-92; 8:45 am]

BILLING CODE 4910-22-M



**Federal Railroad Administration****Environmental Impact Statement for the Texas High-Speed Rail Project**

**AGENCY:** Federal Railroad Administration, Texas High-Speed Rail Authority.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Federal Railroad Administration (FRA) and the Texas High-Speed Rail Authority (THSRA) hereby give notice that they intend to

prepare an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act of 1969 (NEPA) on the proposed Texas High-Speed Rail Project (Project). The EIS will evaluate the proposed Project, the no-action alternative, and other reasonable alternatives identified in the scoping process. Scoping will be accomplished by correspondence with interested persons, organizations, and federal, state, and local agencies, and through public scoping meetings.

**ADDRESS:** Written comments on the scope of alternatives and potential

impacts should be addressed to THSRA's EIS contractor, Woodward-Clyde Consultants, at the following address: Woodward-Clyde Consultants P.O. Box 684594 Austin, Texas 78768-4594.

**DATES:** Written comments should be sent to Woodward-Clyde Consultants by July 13, 1992. Comments will also be accepted at a series of public scoping meetings from 2:00 p.m. to 10:00 p.m. on the dates and at the locations indicated below:

County	City	Location, street address, directions	Date
Austin	Bellville	Austin County Fairgrounds, Women's Exhibit Building Highway 159, On highway 159 one mile east of Town Square.	June 3, 1992.
Bastrop	Bastrop	American Legion Hall, Loop 150 (across from State Park entrance), Across from the State Park on edge of town.	June 18, 1992.
Bell	Belton	Bell County Expo Center, 301 W. Loop 121, Interstate 35 just south of town.	June 10, 1992.
Bexar	San Antonio	Convention Center, 200 E. Market, At South Alamo downtown	May 28, 1992.
Brazos	Bryan	Brazos Center, 3232 Briarcrest, Off Texas 6/East Bypass at FM 1179	May 12, 1992.
Burleson	Caldwell	Czech Spist Hall, Highway 36 South, On 536 just outside city limits next to fairgrounds, intersection 2 miles.	May 13, 1992.
Caldwell	Lockhart	Plum Creek Elementary, 710 Flores Street, Off of 183 (South of Austin)	June 10, 1992.
Colorado	Columbus	Knights of Columbus Hall, 1136 Milam	June 2, 1992.
Comal	New Braunfels	Civic Center, 380 S. Seguin, Downtown 6 blocks off of 35	May 27, 1992.
Dallas	Dallas	Convention Center, 650 S. Griffin	June 16, 1992.
Ellis	Waxahachie	Southwestern College, 1200 Sycamore, 5 blocks west of Ferris Avenue	June 18, 1992.
Falls	Westfalla	Church of the Visitation Parish Hall, On FM Road 317 on the edge of town.	June 8, 1992.
Falls	Marlin	Knights of Columbus Hall, Highway 7 East, On the edge of town	June 9, 1992.
Fayette	La Grange	Knights of Columbus Hall, 190 S. Brown	June 11, 1992.
Fort Bend	Richmond	B Building/County Fairgrounds, 4310 Highway 36 South, Located 1 mile from 59.	May 20, 1992.
Freestone	Fairfield	VFW Hall, 5872 VFW Street, Highway 488	June 4, 1992.
Gonzales	Gonzales	Gonzales High School Cafeteria, Sara Dewitt Drive, 183—first light—left-around bypass takes you to High School.	June 9, 1992.
Grimes	Anderson	VFW, Highway 105 West, Just out of Navasota on highway 105 West	May 28, 1992.
Guadalupe	Seguin	Guadalupe County Coliseum, 810 S. Guadalupe, Before Starke Park in city limits.	May 26, 1992.
Harris	Houston	Marriot West Loop, 1750 West Loop South	May 21, 1992.
Hays	San Marcos	San Marcos High School Cafeteria, 1301 S. Seguin Highway, Hill	June 17, 1992.
Hill	Hillsboro	Our Lady of Mercy Catholic Church, Fellowship Hall, Off Interstate 35, exit 368, North end of West access road.	June 23, 1992.
Johnson	Cleburne	Civic Center, 1501 W. Henderson	June 24, 1992.
Lee	Giddings	American Legion Hall, Highway 77 South, 2 miles south Giddings on Highway 77.	June 24, 1992.
Leon	Centerville	Community Center, Lassiter Street, 1/2 mile from downtown, south on Highway 75.	June 2, 1992.
Limestone	Groesbeck	Groesbeck Civic Center, 105 E. Navasota, Near downtown	June 11, 1992.
Madison	Madisonville	Woodbine Hotel, 209 E. Madison, Down from Courthouse	May 13, 1992.
McLennan	Waco	Convention Center, 100 Washington Ave., Corner of University Parks Drive & Washington Ave.	June 25, 1992.
Milam	Cameron	VFW Hall, VFW Post 2010, 807 N. Houston	June 23, 1992.
Montgomery	Conroe	First Christian Church, 3500 Loop 336 West, On Loop 336 between 105 & 2854.	May 27, 1992.
Navarro	Corsicana	Corsicana High School, West Highway 22	June 3, 1992.
Robertson	Franklin	Fireman's Hall, Highway 190 West, From 485—1 mile north	May 14, 1992.
Tarrant	Fort Worth	Amon G. Carter Exhibits Hall, 3301 Crestline Street	June 17, 1992.
Travis	Austin	Hilton Hotel, 600 Middle Fiskville Road, Off Interstate 35 and 290 in North Austin.	June 16, 1992.
Walker	Huntsville	Walker County Fairgrounds, Main Building, Highway 30	May 26, 1992.
Waller	Hempstead	Prairie View A&M University, Alumni Center, West Wing, 3 1/2 miles east of Hempstead at the intersection with FM Road 1098.	May 19, 1992.
Washington	Brenham	Firemen's Training Center, 1306 West Main, Off Loop 290	May 14, 1992.
Wharton	Wharton	Civic Center, Main Hall, 1924 N. Fulton, 8 blocks from Courthouse	June 4, 1992.
Williamson	Georgetown	San Gabriel Community Center, San Gabriel Park Road, San Gabriel Park North of downtown.	June 25, 1992.

**PUBLIC SCOPING MEETINGS:** These meetings will use an open house format between 2 p.m. and 10 p.m. during which

time interested parties can discuss and comment on the proposed project and its alternatives. At 7 p.m., a group meeting

will be convened which will include a brief presentation to include an overview of the proposed project and



the EIS process. At this time there will be an opportunity to make comments in a group setting. All comments received throughout the day will be made part of the administrative record for the EIS and will be evaluated as part of the scoping process.

**FOR FURTHER INFORMATION CONTACT:**

David B. Barrows or R. Clint Miller, Woodward-Clyde Consultants, P.O. Box 684594, Austin, Texas 78768-4594, (800) 998-7787.

or

Mark E. Yachmetz, Federal Railroad Administration (RDV-1), 400 Seventh Street SW., Washington, DC 20590, (202) 366-6593.

or

Steven Polunsky, Texas High-Speed Rail Authority, suite 1502, 823 Congress Avenue, Austin, Texas 78701, (512) 478-5484.

**SUPPLEMENTARY INFORMATION:** FRA, in cooperation with the THSRA, will prepare an environmental impact statement (EIS) on a private sector proposal to build, operate, and maintain a high-speed passenger railroad between the cities of Austin, San Antonio, Dallas, Fort Worth, and Houston. The project will also provide high-speed rail service to the Dallas/Fort Worth (D/FW) International Airport. Limited or special service to Bryan/College Station, Waco, Houston Intercontinental Airport, and other locations may be provided at such times as ridership and appropriate community support makes such service economically feasible.

On May 28, 1991, THSRA, in accordance with the provisions of the Texas High-Speed Rail Act (TEX. REV. CIV. STAT. ANN. Art. 6674v.2 [Vernon. Supp. 1991]), awarded a franchise to the Texas High-Speed Rail Corporation (Corporation) for the proposed construction and operation of the high-speed rail transportation system described above. That system will be subject to the Federal Railroad Safety Act of 1970 (FRSA). Pursuant to its responsibilities under FRSA, FRA proposes to issue a rule of particular applicability that will form the basis for the regulation by FRA of the safety of the proposed project. Consequently, FRA is preparing the environmental impact statement that is the subject of this notice of intent. THSRA has been designated a joint lead agency for the preparation of the EIS pursuant to section 1501.5(b) of the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (CEQ Regulations, 40 CFR parts 1500-1508).

**SCOPING:** FRA and THSRA invite interested individuals, organizations, and federal, state and local agencies to

participate in defining the reasonable alternatives to be evaluated in the EIS and in identifying any significant social, economic, or environmental issues related to the alternatives. Scoping comments can be made verbally at the public scoping meeting or in writing. (See the **DATES** and **ADDRESSES** sections above for locations and times of scoping meetings.) During scoping, comments should focus on identifying specific impacts to be evaluated and suggesting alternatives that are less costly or less environmentally damaging while achieving similar objectives. Comments may also identify issues which are not significant or which have been covered by prior environmental review. Scoping is not the time to indicate a preference for a particular alternative. There will be an opportunity to comment on preferences after the Draft EIS is completed.

**ADDITIONAL INFORMATION:** An information packet describing the Project and EIS process in more detail will be available at the public scoping meetings or from Woodward-Clyde Consultants at the address listed above.

**MAILING LIST:** If you wish to be placed on the mailing list to receive further information as the EIS process develops, contact Woodward-Clyde Consultants at the address listed above.

**PROJECT PURPOSE, PROJECT DESCRIPTION AND STUDY AREA:** Pursuant to the Texas High-Speed Rail Act, THSRA has awarded a franchise to the Corporation to develop and operate a high-speed rail system. The purpose of this franchise award is to permit the private sector development of an alternative form of transportation linking major cities in Texas with the expectation that high-speed rail service would reduce existing and future pressure on the airport and highway systems of the state.

The corporation estimates that approximately 8.7 million trips per year will be taken on the rail system by the year 2000, and 14.5 million trips per year are estimated by the year 2015. The project calls for passenger trains to operate 365 days per year, approximately between the hours of 6 a.m. and midnight. Trains are expected to depart every half hour during normal operating hours and every 15 minutes during peak periods. During the hours of midnight to 6 a.m., the system will be physically inspected and necessary maintenance will be performed. The Corporation plans development of a system incorporating the French-developed TGV high speed rail technology with operating speeds of 200 miles per hour where conditions permit.

The system would be electrically powered, with power acquired from the commercial electric grid in the project area. The trains would draw their power from an overhead catenary system.

The project would involve construction of new track and signal systems for the exclusive use of the project, although there may be limited sharing of existing right-of-way in some urban areas. The rail line would be standard gauge and double tracked with concrete crossties and crushed stone ballast, similar to that used for other rail service in the U.S. The track alignment would be fully fenced and grade-separated from intersecting streets, highways, and railroads, except in certain locations where lower speed operations would occur. Bridges or other appropriate structures are proposed to provide for highway, street and railroad separations, wildlife crossings and cross-track access for agriculture purposes. The average proposed right-of-way width is 200 feet and may range from 50 feet to 300 feet, depending upon terrain and cut and fill requirements.

The project will also include construction or renewal of train stations and the development of maintenance facilities and rail yards necessary to support the proposed rail operations. Passenger terminals are proposed for the Houston central business district, the Houston northwest suburban area, the Dallas central business district, the D/FW airport, the Ft. Worth central business district, the Austin area, and the San Antonio area. Maintenance facilities are proposed to be located approximately every 50 miles along the rail route.

The Corporation has proposed a route it believes will avoid environmentally sensitive areas and minimize impacts on existing or planned land uses. The proposed overall configuration of the alignment forms a triangle with apex points near Hockley (NW of Houston), San Marcos, and near Navarro Mills Lake. These apex points are connected by links to Houston, Dallas, Ft. Worth and San Antonio.

The proposed alignment is described as follows. The proposed east leg of the system begins in Houston where the system would share right-of-way with the Southern Pacific Railroad or utilize the anticipated abandoned Missouri Kansas Texas (MKT) Railroad from the downtown station west to near the I-610 west loop. From west of I-610 loop to Hockley Junction, the proposed system would share right-of-way with the Southern Pacific Railroad before turning to the northwest on new right-of-way generally paralleling existing power



transmission lines west of I-45 toward Dallas until it reaches Navarro Junction. From Navarro Junction, the proposed system would proceed in a northerly direction until it reaches Navarro Junction. From Navarro Junction, the proposed system would proceed in a northerly direction until it reaches Dallas. Near I-20 in South Dallas, the proposed alignment would generally follow the MKT tracks to Dallas Union Station. From Dallas to D/FW Airport, the proposed alignment would share right-of-way with Railtrans, which if jointly owned by the cities of Dallas and Fort Worth. Near Belt Line Road in Irving, the proposed alignment would swing north, then enter D/FW Airport. Also near Belt Line Road, the proposed alignment would proceed westerly toward Fort Worth along the Railtrans alignment.

The proposed western leg begins in San Antonio where the system would share right-of-way with Southern Pacific Railroad from the San Antonio Station to Cibola. From Cibola, the proposed alignment would run parallel to and approximately four to five miles east of I-35 to San Marcos Junction, then proceed toward Austin and to Navarro Junction, where it would follow the same path towards Dallas, as described above.

The proposed southern leg would proceed approximately due east from San Marcos Junction to Hockley Junction. The southern leg is not proposed for construction at this time, but may be constructed at some future date dependent upon ridership and other economic factors.

**ALTERNATIVES:** Reasonable alternatives to the proposed action will be included in the scope of environmental analysis for consideration by FRA and THSRA. These alternatives will include, but are not limited to, alternatives to the proposed route alignment, station locations, and operating procedures, the no-action alternative and any other alternatives identified in the scoping process. The no-action alternative could include short-term minor activities to improve the existing transportation conditions, such as safety and maintenance improvements.

**PROBABLE EFFECTS:** FRA and THSRA will evaluate all significant environmental, social, and economic impacts of the alternatives analyzed in the EIS. Impacts anticipated include, but are not necessarily limited to, changes in the natural environment (air and water quality, natural ecology possibly including rare and endangered species), changes in the social environment (agriculture, land use and neighborhoods, noise and vibration,

aesthetics, historic/archaeological resources), human health (electromagnetic field effects), and changes in transportation patterns and safety. The impacts will be evaluated both for the construction period and for the long-term period of operation and for decommissioning. Measures to mitigate significant adverse impacts will be addressed.

**PROCEDURES:** The Draft EIS will be prepared based upon the scoping report. After its publication, the Draft EIS will be available for public and agency review and comment, and public hearings will be held. A Final EIS will be prepared that addresses the comments on the Draft EIS.

Issued in Washington, DC on April 7, 1992.

James T. McQueen,

Associate Administrator for Railroad Development.

[FR Doc. 92-8386 Filed 4-9-92; 8:45 am]

BILLING CODE 4910-06-M

## Research and Special Programs Administration

[Docket No. P-91-4W; Notice 2]

### Transportation of Natural and Other Gas by Pipeline; Grant of Waiver; Northwest Pipeline Corp.

The Northwest Pipeline Corporation (Northwest) petitioned the Research and Special Programs Administration (RSPA) for a waiver from compliance with 49 CFR 192.611(c) for its 26-inch main line between mileposts 1393.79 and 1394.57 (0.78 miles) and mileposts 1395.99 and 1396.52 (0.53 miles) in Snohomish County, Washington. Section 192.611(c) requires confirmation or revision of a pipeline's maximum allowable operating pressure (MAOP) within 18 months of a change in class location (or population density). Northwest determined that, effective October 4, 1990, the class location of the above sections of main line and of a 30-inch loop line, changed from Class Location 2 to Class Location 3. Such class location change determination was made pursuant to a study required by § 192.609 due to an increase in population density. Absent a waiver, Northwest would be required, on April 4, 1992, to either (1) reduce MAOP on the 26-inch main line from 674 psig to 562 psig, or (2) retest the line for operation at 674 psig (60 percent of the specified minimum yield of the pipe) pursuant to § 192.611(a)(1). Northwest seeks a waiver of this requirement for a 6-month period ending September 30, 1992. No waiver is required for the 30-

inch loop line because it meets Class Location 3 standards.

The waiver would allow Northwest to maintain throughput pending requalification by hydrostatic testing of a 46.25 mile portion of the system. Northwest filed a certificate application with the Federal Energy Regulatory Commission (FERC) on December 31, 1990, seeking approval to expand and upgrade certain existing facilities (Docket No. CP91-780-000,002). Northwest estimates construction and requalification of the pipeline should be complete by September 30, 1992, assuming timely receipt of FERC approval.

In response to the petition, and the justification contained therein, RSPA issued a Notice of Petition for Waiver inviting interested parties to comment (Notice 1) (57 FR 6884; February 28, 1992). In that notice, RSPA explained why granting a waiver from 49 CFR 192.611(c) for a 6-month period to allow the operator sufficient time to expand and upgrade the pipeline would not affect safety.

Comments were received from two respondents. Each endorsed the petition and recommended granting the waiver. However, one respondent recommended granting the waiver. However, one respondent recommended that patrols of the two sections of the pipeline requiring waiver be done daily for the duration of the waiver. In the petition, Northwest said the pipelines are patrolled weekly. In contrast, § 192.705 allows intervals between patrols of as long as 7½ months for transmission lines in class 3 locations. The respondent did not provide justification for daily patrols. Further, since Northwest has not reported any leaks or failures or other adverse factors on the sections requiring waiver, we believe daily patrols are not needed for safety.

In accordance with the foregoing, RSPA, by this order, finds that compliance with § 192.611(c) is unnecessary for the reasons stated in the Notice of Petition for Waiver (57 FR 6884; February 28, 1992), and that the requested waiver would not be inconsistent with pipeline safety. Accordingly, Northwest Pipeline Corporation's petition for waiver from compliance with § 192.611(c) is granted for the period beginning April 4, 1992 and ending September 30, 1992.

Issued in Washington, DC on April 6, 1992

George W. Tenley, Jr.,

Associate Administrator for Pipeline Safety.

[FR Doc. 92-8286 Filed 4-9-92; 8:45 am]

BILLING CODE 4910-60-M



**DEPARTMENT OF THE TREASURY****Public Information Collection Requirements Submitted to OMB for Review**

Date: April 6, 1992.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

**Bureau of Alcohol, Tobacco and Firearms***OMB Number:* 1512-0336.*Form Number:* ATF REC 5150/2.*Type of Review:* Extension.*Title:* Letterhead Applications and Notices Related to Denatured Spirits.

*Description:* Denatured Spirits are used for nonbeverage industrial purposes in the manufacture of personal/household products. Permits/Applications control the authorized uses and flow. Tax revenue and public safety is protected.

*Respondents:* State or local governments, Businesses or other for-profit, Small businesses or organizations.

*Estimated Number of Respondents:* 3,111.*Estimated Burden Hours Per**Respondent:* 30 minutes.*Frequency of Response:* On occasion.*Estimated Total Reporting Burden:* 1,556 hours.*OMB Number:* 1512-0337.*Form Number:* ATF REC 5150/1.*Type of Review:* Extension.*Title:* Usual and Customary Business Records Relating to Denatured Spirits.

*Description:* Denatured Spirits are used for nonbeverage industrial purposes in the manufacture of personal/household products. Records ensure spirits accountability. Tax revenue and public safety are protected.

*Respondents:* State or local governments, Businesses or other for-profit, Small businesses or organizations.

*Estimated Number of Recordkeepers:* 3,111.*Estimated Burden Hours Per**Recordkeeper:* 1 hour.*Frequency of Response:* Other.*Estimated Total Reporting Burden:* 1 hour.

*Clearance Officer:* Robert N. Hogarth, (202) 927-8930, Bureau of Alcohol, Tobacco and Firearms, room 3200, 650 Massachusetts Avenue, NW., Washington, DC 20226.

*OMB Reviewer:* Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

*Lois K. Holland,**Departmental Reports Management Officer.*

[FR Doc. 92-8279 Filed 4-9-92; 8:45 am]

BILLING CODE 4810-31-M

**Public Information Collection Requirements Submitted to OMB for Review**

Date: April 1, 1992.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

**Internal Revenue Service***OMB Number:* New.*Form Number:* None.*Type of Review:* New collection.

*Title:* Focus Group Interviews to Assess Clarity and Effectiveness of Internal Revenue Notices.

*Description:* The group interviews are necessary to obtain public input on the clarity and effectiveness of some of the notices mailed to taxpayers. The results will be used to revise notices in the future in an ongoing effort to provide clear and effective notices mailed to taxpayers.

*Respondents:* Individuals or households.

*Estimated Number of Respondents:* 900.*Estimated Burden Hours Per**Respondent:* 2 hours.*Frequency of Response:* Other (One-time Interviews).*Estimated Total Reporting Burden:* 291 hours.

*Clearance Officer:* Garrick Shear, (202) 535-4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

*Lois K. Holland,**Departmental Reports Management Officer.*

[FR Doc. 92-8280 Filed 4-9-92; 8:45 am]

BILLING CODE 4830-01-M

**Internal Revenue Service****Trade Show: IRS Electronic Tax Filing National Conference and Exhibition**

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Nation of IRS's Electronic Tax Filing National Conferences and Exhibitions for 1992.

**SUMMARY:** The Electronic Filing Systems Office of the Internal Revenue Service (IRS) is offering three IRS Electronic Tax Filing National Conferences and Exhibitions in 1992. Dates and locations for the conferences are: July 21-22 in Nashville, TN; August 13-14 in New York, NY; and August 27-28 in San Diego, CA.

The conference and exhibition will provide a forum, in a trade show environment, on the latest information about electronic filing of federal tax returns. It will also be an opportunity to view the latest in computer hardware and software used for electronic tax filing.

Vendors of computer hardware, software, and other services related to electronic filing of tax return data are invited to exhibit their products during these two-day shows.

Seminars will be provided for new and experienced participants in electronic tax filing. Topics covered in the seminars will include the electronic filing of Individual returns and electronic/magnetic media filing of Fiduciary, Partnership, Employee Pension Plan returns. Attendance at these seminars will qualify for Continuing Professional Education (CPE) credits.

Electronic filing participants who currently have an application on file with IRS, will receive a mail-out that details the specifics of these shows.

**DATES:** July 21-22 in Nashville, TN; August 13-14 in New York, NY; and August 27-28 in San Diego, CA.

**ADDRESSES:**

Opryland Hotel, 2800 Opryland Drive, Nashville, TN 37214.

New York Marriott Marquis, 1535 Broadway, New York, NY 10036.

Sheraton Harbor Island, 1380 Harbor Island Drive, San Diego, CA 92101.



**FOR FURTHER INFORMATION CONTACT:**

Anyone interested in being an exhibitor may obtain an Exhibitor Prospectus by contacting: Rodney K. West, (310) 773-1881, RP Exhibit Service, Inc., 1761 Olive Street, Capitol Heights, MD 20743, FAX # 301-773-8742. Questions about attending the shows should be directed to the Electronic Filing Coordinator at your local IRS district office.

Peggy Strunk,

Chief, Marketing and Quality Assurance Section.

[FR Doc. 92-8340 Filed 4-9-92; 8:45 am]

BILLING CODE 4830-01-M

## Bureau of Engraving and Printing

### Privacy Act of 1974; New System of Records

**AGENCY:** Bureau of Engraving and Printing, Department of the Treasury.

**ACTION:** Notice of a proposed new Privacy Act system of records.

**SUMMARY:** The Bureau of Engraving and Printing (BEP) proposes to add one new system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a). The Mail Order Sales Customer records system is being established to: (1) Maintain information regarding customers to inform them of BEP products; (2) provide the capability to research in response to customer inquiries; and (3) transmit credit information to financial institutions for approval or disapproval. **DATES:** Comments must be received no later than May 11, 1992. The new system of records will be effective June 9, 1992, unless BEP receives comments on the new system of records which would result in a contrary determination.

**ADDRESSES:** Please submit comments to the Disclosure Officer, Bureau of Engraving and Printing, Room 321-12A, 14th and C Streets, SW., Washington, DC 20228.

### FOR FURTHER INFORMATION CONTACT:

Lawrence F. Zenker, Disclosure Officer, Bureau of Engraving and Printing, Room 321-12A, 14th and C Streets, SW., Washington, DC 20228, Phone: (202) 447-0851.

**SUPPLEMENTARY INFORMATION:** The new system report, as required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Government Operations in the House of Representatives, the Committee on Governmental Affairs in the Senate, and the Office of Management and Budget (OMB), pursuant to paragraph 4b of appendix I of OMB Circular A-130, "Federal Responsibilities for

Maintaining Records About Individuals," dated December 12, 1985 (50 FR 52730, dated December 24, 1985).

### Treasury/BEP. 045

#### SYSTEM NAME:

Mail Order Sales Customer Files—Treasury/BEP.

#### SYSTEM LOCATION:

Bureau of Engraving and Printing, 14th and C Streets, SW., Washington, DC 20228.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Customers ordering engraved prints and numismatic products from the Bureau of Engraving and Printing through the mail, and those individuals who have requested that their names be placed on the BEP mailing list.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Mail Order Customers' names, addresses, company names, credit card numbers and expiration dates; history of customer sales; and inventory data.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301.

#### PURPOSE(S):

The purposes of the Mail Order Sales Customer Files are to: (1) Maintain information regarding customers to inform them of BEP products; (2) provide the capability to research in response to customer inquiries; and (3) transmit credit information to financial institutions for approval or disapproval.

#### ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

These records and information from these records may be used to electronically transmit credit card information to obtain approval or disapproval from the issuing financial institution. Categories of users include personnel involved in credit card approval.

#### DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Debt information concerning a Government claim against an individual is also furnished, in accordance with 5 U.S.C. 552a(b)(12) and section 3 of the Debt Collection Act of 1982 (Pub. L. 97-365), to consumer reporting agencies to encourage repayment of an overdue debt.

#### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM: STORAGE:

Records consist of paper records maintained in file folders and in electronic media.

#### RETRIEVABILITY:

By customer name, order number or customer number.

#### SAFEGUARDS:

Access is limited to those authorized individuals who process orders, research customer orders or maintain the computer system. In addition, files and computer data are maintained in a secured area. Access to electronic records is by password.

#### RETENTION AND DISPOSAL:

Files on customers who have not purchased any products are kept for two years, after which they are taken out of the active system and placed in a separate storage file. This file generates two additional annual mailings after which time they are purged from the system. (Should a customer reorder after being placed on this file, they will be assigned a new customer number and placed back in the main system).

#### SYSTEM MANAGER(S) AND ADDRESS:

Chief, Office of Public Affairs, Bureau of Engraving and Printing, 14th and C Streets, SW., Room 533M, Washington, DC 20228.

#### NOTIFICATION PROCEDURE:

Individuals wishing to be notified if they are named in this system of records, gain access to the records, or contest the contents of any records maintained in this system may inquire in accordance with instructions appearing in 31 CFR part 1, subpart C, appendix F. Address inquiries to Disclosure Officer, Bureau of Engraving and Printing, 14th and C Streets, SW., Washington, DC 20228.

#### RECORDS ACCESS PROCEDURES:

See "Notification Procedure" above.

#### CONTESTING RECORD PROCEDURE:

See "Notification Procedure" above.

#### RECORD SOURCE CATEGORIES:

Customers, BEP Employees, financial institutions.

#### SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.



Dated: April 1, 1992.

David M. Nummy,

Assistant Secretary (Management).

[FR Doc. 92-8281 Filed 4-9-92; 8:45 am]

BILLING CODE 4840-01

## UNITED STATES INFORMATION AGENCY

### Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Andrea Mantegna" (see list<sup>1</sup>) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign lender. I also determine that the temporary exhibition or display of the listed exhibit objects at the Metropolitan Museum of Art, New York, New York beginning on or about April 27, 1992, to on or about July 12, 1992, is in the national interest.

Public notice of this determination is ordered to be published in the Federal Register.

Alberto J. Mora,

General Counsel.

[FR Doc. 92-8504 Filed 4-9-92; 8:45 am]

BILLING CODE 8230-01-M

## DEPARTMENT OF VETERANS AFFAIRS

### Special Medical Advisory Group; Availability of Annual Report

Under section 10(d) of Public Law 92-463 (Federal Advisory Committee Act) notice is hereby given that the Annual Report of the Department of Veterans Affairs' Special Medical Advisory Group for fiscal Year 1991 has been issued. The report summarizes activities of the Group on matters relative to the care and treatment of disabled veterans and other matters pertinent to the Department of Veterans Affairs' Veterans Health Administration. It is

<sup>1</sup> A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202/619-5078, and the address is room 700, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547.

available for public inspection at two locations:

Federal Documents Section, Exchange and Gift Division, LM 632, Library of Congress, Washington, DC 20540 and

Department of Veterans Affairs, Office of the Chief Medical Director, Techworld Room 710, 801 I Street, NW., Washington, DC 20001.

Dated: April 3, 1992.

By Direction of the Secretary.

Diane H. Landis,

Committee Management Officer.

[FR Doc. 92-8345 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

### Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information:

The title of information collection, and the Department form number(s), if applicable;

(2) A description of the need and its use;

(3) Who will be required or asked to respond;

(4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;

(5) the estimated average burden hours per respondent;

(6) The frequency of response; and

(7) An estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy Assistant Secretary for Information Resources Policies and Oversight.

### Extension

1. Certificate Showing Residence and Heirs of Deceased Veteran or Beneficiary, VA Form 29-541.

2. This form is used to solicit information to establish entitlement to Government life insurance proceeds.

3. Individuals or households.

4. 1,039 hours.

5. 30 minutes.

6. On occasion.

7. 2,078 respondents.

[FR Doc. 92-8347 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

### Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information:

(1) The title of the information collection, and the Department form number(s), if applicable;

(2) A description of the need and its use;

(3) Who will be required or asked to respond;

(4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;

(5) The estimated average burden hours per respondent;

(6) The frequency of response; and

(7) An estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the



OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

*Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.*

#### Reinstatement

1. Designation of Certifying Official(s), VA Form 22-8794.

2. The form notifies VA of the individual who may certify reports of enrollment and pursuits of training on behalf of a training institution or establishment.

3. State or local governments; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations.

4. 533 hours.

5. 10 minutes.

6. On occasion.

7. 3,200 respondents.

[FR Doc. 92-8349 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

#### Information Collection Under OMB Review

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information:

- (1) The title of the information collection, and the Department form number(s), if applicable;
- (2) A description of the need and its use;
- (3) Who will be required or asked to respond;
- (4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;
- (5) The estimated average burden hours per respondent;
- (6) The frequency of response; and
- (7) An estimated number of respondents.

**ADDRESSES:** Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to

VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

**DATES:** Comments on the information collection should be directed to the OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

*Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.*

#### Reinstatement

1. Federal Fiduciary's Account, VA Form 27-4706b.

2. The form is used by all Federal fiduciaries who are required to account to VA for benefits paid to them on behalf of a beneficiary rated incompetent or under legal disability.

3. Individuals or households; State or local governments; Businesses or other for-profit; Federal agencies or employees; Non-profit institutions; Small businesses or organizations.

4. 4,370 hours.

5. 30 minutes.

6. On occasion; Annually; Biennially; Triennially.

7. 8,740 respondents.

[FR Doc. 92-8350 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

#### Information Collection Under OMB Review

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information:

- (1) The title of the information collection, and the Department form number(s), if applicable;
- (2) A description of the need and its use;
- (3) Who will be required or asked to respond;
- (4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;
- (5) The estimated average burden hours per respondent;
- (6) The frequency of response; and
- (7) An estimated number of respondents.

**ADDRESSES:** Copies of the proposed information collection and supporting

documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

**DATES:** Comments on the information collection should be directed to the OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

*Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.*

#### Reinstatement

1. Supplemental Information for Change of Program or Reenrollment After Unsatisfactory Attendance, Conduct or Progress, VA Form 22-8873.

2. The form is used to request information to evaluate the suitability of a training program and/or information regarding unsatisfactory progress or conduct in training. This information is used to make determinations prior to authorization of benefit payment.

3. Individuals or households.

4. 11,000 hours.

5. 30 minutes.

6. On occasion.

7. 22,000 respondents.

[FR Doc. 92-8351 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

#### Information Collection Under OMB Review

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information:

- (1) The title of the information collection, and the Department form number(s), if applicable;
- (2) A description of the need and its use;
- (3) Who will be required or asked to respond;



(4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;

(5) The estimated average burden hours per respondent;

(6) The frequency of response; and

(7) An estimated number of respondents.

**ADDRESSES:** Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

**DATES:** Comments on the information collection should be directed to the OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

*Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.*

#### Extension

1. Application for Reimbursement from Accrued Amounts Due a Deceased Beneficiary, VA Form 21-601.

2. Federal law states that accrued benefits may be paid upon the death of a beneficiary and list the order in which the benefits may be paid. The completed form supplies VA with the information required to properly pay accrued benefits.

3. Individuals or households.

4. 1,875 hours.

5. 30 minutes.

6. On occasion.

7. 3,750 respondents.

[FR Doc. 92-8352 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

#### Information Collection Under OMB Review

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information:

(1) The title of the information collection, and the Department form number(s), if applicable;

(2) A description of the need and its use;

(3) Who will be required or asked to respond;

(4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;

(5) The estimated average burden hours per respondent;

(6) The frequency of response; and

(7) An estimated number of respondents.

**ADDRESSES:** Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

**DATES:** Comments on the information collection should be directed to the OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

*Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.*

#### Revision

1. Veteran's Application for Compensation or Pension, VA Form 21-526.

2. The form is used to gather the information needed to determine eligibility for disability benefits.

3. Individuals or households

4. 372,426 hours.

5. 90 minutes.

6. On occasion.

7. 248,284 respondents.

[FR Doc. 92-8353 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

#### Information Collection Under OMB Review

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C.

chapter 35). This document lists the following information:

(1) The title of the information collection, and the Department form number(s), if applicable;

(2) A description of the need and its use;

(3) Who will be required or asked to respond;

(4) An estimate of the total annual reporting hours, and recordkeeping burden, if applicable;

(5) The estimated average burden hours per respondent;

(6) The frequency of response; and

(7) An estimated number of respondents.

**ADDRESSES:** Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

**DATES:** Comments on the information collection should be directed to the OMB Desk Officer on or before May 11, 1992.

Dated: April 6, 1992.

By direction of the Secretary.

Frank E. Lalley,

*Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.*

#### Extension

1. Statement of Holder or Servicer of Veteran's Loan, VA Form Letter 26-559.

2. This form letter is completed by holders or servicers of guaranteed or insured home loans from which obligors may be released from liability and/or substitution entitlement. Information collected is used to determine that the loan is current.

3. Businesses or other for profit.

4. 3,000 hours.

5. 10 minutes.

6. On occasion.

7. 18,000 respondents.

[FR Doc. 92-8354 Filed 4-9-92; 8:45 am]

BILLING CODE 8320-01-M

#### Advisory Committee on Readjustment of Vietnam and Other War Veterans; Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92-



463 that a meeting of the Advisory Committee on Readjustment of Vietnam and Other War Veterans will be held April 30 and May 1, 1992. This is a regularly scheduled meeting for the purposes of reviewing VA and other relevant services for Vietnam and other war veterans, to review Committee work in progress and to formulate Committee recommendations and objectives. The meeting will be held at TechWorld located at 801 I Street, NW., Washington, DC. The meeting on April 30 will be conducted in room 1005 and on May 1 in room 1208. The meetings on April 30 and May 1 will both begin at 8:30 a.m. and conclude at 4:30 p.m. The agenda for April 30 will consist of a

question and answer discussion with the Readjustment Counseling Service Regional Managers regarding Vet Center operations, and, separately, will address the Committee's work in progress. Major topics for the latter will include coordination of compensation and treatment for war-related post-traumatic stress disorder (PTSD), a system-wide coordinated plan for PTSD services and review of recommendations regarding the Readjustment Counseling Service Vet Centers.

On May 1, the Committee will review issues, recommendations and objectives regarding services to homeless veterans. The second day's agenda will also consist of a review and discussion of

pending legislation of importance for the readjustment of war veterans.

Both meetings will be open to the public up to the seating capacity of the room. Due to limited seating capacity of the room, those who plan to attend or who have questions concerning the meeting should contact Arthur S. Blank, Jr., M.D., Director, Readjustment Counseling Service, Department of Veterans Affairs (phone number: 202-535-7554).

Dated: April 3, 1992.

By Direction of the Secretary.

**Diane H. Landis,**

*Committee Management Officer.*

[FR Doc. 92-8346 Filed 4-9-92; 6:45 am]

BILLING CODE 8320-01-M



# Sunshine Act Meetings

Federal Register

Vol. 57, No. 70

Friday, April 10, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** Published March 26, 1992, 57 FR 10521.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:** April 10, 1992, 9:00 a.m.

**PLACE:** Public Hearing Room, Suite 700, 625 Indiana Avenue, N.W., Washington, D.C.

**CHANGE IN THE MEETING:** The meeting has been cancelled.

**CONTACT PERSON FOR MORE INFORMATION:** Kenneth M. Pusateri or Carole J. Council, (202) 208-6400.

Dated: April 8, 1992.

Kenneth M. Pusateri,  
General Manager.

[FR Doc. 92-8456 Filed 4-8-92; 2:58 pm]

BILLING CODE 6820-KD-M

## FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Changes in Subject Matter of Agency Meeting

Pursuant to the provisions of subsection (e)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(2)), notice is hereby given that at its closed meeting held at 11:24 a.m. on Tuesday, April 7, 1992, the Corporation's Board of Directors determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Director T. Timothy Ryan, Jr. (Office of Thrift Supervision), concurred in by Vice Chairman Andrew C. Hove, Jr., Chairman William Taylor, and Director Stephen R. Steinbrink (Acting Comptroller of the Currency), that Corporation business required the addition to the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matters:

Recommendation regarding the liquidation of a depository institution's assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:

Case No. 5498—Broadway Bank & Trust Company, Paterson, New Jersey

Requests for waiver and/or exemption of the cross-guaranty provisions of the Federal Deposit Insurance Act.

The Board further determined, by the same majority vote, that no earlier notice of the changes in the subject matter of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

Dated: April 7, 1992.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 92-8385 Filed 4-7-92; 4:27 pm]

BILLING CODE 6714-0-M

## FEDERAL MARITIME COMMISSION

**TIME AND DATE:** 10:00 a.m., April 15, 1992.

**PLACE:** Hearing Room One, 1100 L Street, N.W., Washington, D.C. 20573-0001.

**STATUS:** Part of the meeting will be open to the public. The rest of the meeting will be closed to the public.

**MATTER(S) TO BE CONSIDERED:** Portion open to the public:

1. Report on Reducing Government Regulation.

Portion closed to the public:

1. Automated Tariff Filing and Information System (ATFI); *ANERA v. FMC*, Docket No. 91-3917.

## CONTACT PERSON FOR MORE

**INFORMATION:** Joseph C. Polking, Secretary, (202) 523-5725.

Joseph C. Polking,

Secretary.

[FR Doc. 92-8494 Filed 4-8-92; 2:59 pm]

BILLING CODE 6730-01-M

## BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

**TIME AND DATE:** 10 a.m., Wednesday, April 15, 1992.

**PLACE:** Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, DC 20551.

**STATUS:** Closed.

## MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and

salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

## CONTACT PERSON FOR MORE

**INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: April 8, 1992.

William W. Wiles,

Secretary of the Board.

[FR Doc. 92-8439 Filed 4-8-92; 12 pm]

BILLING CODE 6210-01-M

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### INSTITUTE OF MUSEUM SERVICES

Notice of Meeting

**SUMMARY:** This notice sets forth the agenda of a forthcoming meeting of the National Museum Services Board. This notice also describes the functions of the Board. Notice of this meeting is required under the Government in the Sunshine Act (Pub. L. 94-409) and regulations of the Institute of Museum Services, 45 CFR 1180.84.

**TIME/DATE:** 8:30 a.m. to 2 p.m.—Friday, April 24, 1992.

**STATUS:** Open.

**ADDRESS:** Old Post Office Pavilion, 1100 Pennsylvania Avenue, N.W., Main Floor—Room MO7, Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** S. William Laney, Executive Assistant to the National Museum Services Board, room 510, 1100 Pennsylvania Avenue, N.W., 20506 (202) 786-0536.

## SUPPLEMENTARY INFORMATION:

The National Museum Services Board is established under the Museum Services Act, Title II of the Arts, Humanities, and Cultural Affairs Act of 1976, Public Law 94-462. The Board has responsibility for the general policies with respect to the powers, duties, and authorities vested in the Institute under the Museum Services Act.

The meeting of April 24, 1992 will be open to the public.

If you need special accommodations due to a disability, please contact: Institute of Museum Services, 1100



Pennsylvania Avenue, NW.,  
Washington, DC 20506—(202) 786-0536  
(202) 786-9136 at least seven (7) days  
prior to the meeting.

#### National Museum Services Board

April 24, 1992—Meeting Agenda

#### I. NMSB Chairman's Report and Approval of Minutes from November 15, 1991 Meeting

- II. Agency Agenda Reports: Programs
  - A. General Operating Support Program
    - Proposed Changes
  - B. General Operating Support Program
    - Panel Recommendations
  - C. General Operating Support Program Test
    - Reviews
- III. Agency Agenda Reports: Administration
  - A. Legislative Issues
  - B. Public Affairs
- IV. Director's Report

- A. Museum Leadership Initiative
- B. Reauthorization Issues
- C. Conservation Review
- V. NMSB Open Agenda

Dated: April 7, 1992.

Linda Bell,

Director of Policy Planning and Budget.  
[FR Doc. 92-8394 Filed 4-8-92; 11:59 am]

BILLING CODE 7036-01-M



# Corrections

Federal Register

Vol. 57, No. 70

Friday, April 10, 1992

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Toxic Substances and Disease Registry

[ATSDR-51]

#### Quarterly Health Assessments Completed and Health Assessments To Be Conducted in Response to Requests From the Public

##### Correction

In notice document 92-6122 appearing on page 9259 in the issue of Tuesday,

March 17, 1992, in the 1st column, under **SUPPLEMENTARY INFORMATION**, in the 13th line, "(42 CFR part 30)" should read "(42 CFR part 90)".

BILLING CODE 1505-01-D

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Parts 100, 110 and 165

[CGD1-91-157]

#### Temporary Regulations, Port of New York and New Jersey, July 2-5, 1992

##### Correction

In proposed rule document 92-6780 beginning on page 10308 in the issue of Wednesday, March 25, 1992, make the following corrections:

1. The docket number was printed incorrectly, and should read as set forth above.

#### § 100.35T 01-158 [Corrected]

2. On page 10311, in the second column, in § 100.35T 01-158(b)(2), in the first column of the table, in the second line, "40°41'20.0" N" should read "40°41'29.0" N".

BILLING CODE 1505-01-D



# Corrections

The purpose of the Department of Health and Human Services is to protect the health of the Nation by promoting the highest attainable level of physical, mental, and social well-being. The Department is committed to the highest standards of scientific excellence and to the most effective use of resources. The Department is also committed to the highest standards of ethical conduct and to the most effective use of resources.

## DEPARTMENT OF TRANSPORTATION

Chief Clerk

1000-10-100

1000-10-100

1000-10-100

1000-10-100

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1000-10-100

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

1000-10-100

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1000-10-100



# pesticide

Friday  
April 10, 1992

## Part II

## Environmental Protection Agency

40 CFR Part 455

**Pesticide Chemicals Manufacturing  
Category Effluent Limitations Guidelines,  
Pretreatment Standards, and New Source  
Performance Standards; Proposed Rule**



# ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 455

[FRL-4105-1]

RIN 2040-AB32

### Pesticide Chemicals Manufacturing Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed regulation would limit the discharge of pollutants into navigable waters of the United States and into publicly owned treatment works by existing and new facilities that manufacture pesticide active ingredients. This proposed regulation would establish effluent limitations guidelines based on "best practical control technology", "best conventional pollutant control technology", "best available technology", new source performance standards based on "best demonstrated technology", and pretreatment standards for new and existing indirect dischargers. EPA is also proposing new test procedures for the analysis of pesticide pollutants in the Pesticide Chemicals Category.

**DATES:** Comments on the proposal must be received by June 9, 1992. Comments are to be submitted to: Dr. Thomas E. Fielding, Engineering and Analysis Division (WH-552), U.S. EPA, 401 M Street SW., Washington, DC 20460.

**ADDRESSES:** The basis for this regulation is detailed in two major documents: a technical document, and an economic document. The analytical methods proposed in this notice for the measurement of pesticide active ingredients in wastewater are contained in an analytical methods compendium document. See the Supplementary Information Overview section below for a description of each document.

Copies of the technical, economic, and analytical methods documents may be obtained from: Dr. Thomas E. Fielding, Engineering and Analysis Division (WH-552), U.S. EPA, 401 M Street SW., Washington, DC 20460.

The Record for this rulemaking is available for public review at the EPA Headquarters Library, room M2404, 401 M Street SW., Washington, DC. The EPA information regulation (40 CFR part 2) provides that a reasonable fee may be charged for copying.

In addition, EPA will conduct a workshop covering this rulemaking, in conjunction with a public hearing on the pretreatment standards portion of the rule. The workshop will be held on May 15, 1992, from 9 a.m. to 12 p.m. in room 3 North of the Washington Information Center Conference Rooms, Waterside Mall, 401 M Street SW., Washington, DC. The public hearing will be conducted from 1:30 p.m. to 5 p.m. at the same location. Persons wishing to present formal comments at the public hearing should have a written copy for submittal.

#### FOR FURTHER INFORMATION CONTACT:

For additional technical information contact Dr. Thomas E. Fielding, Engineering and Analysis Division (WH-552), U.S. EPA, 401 M Street SW., Washington, DC 20460, (202) 260-7156. Additional economic information may be obtained by contacting: Dr. Lynne G. Tudor, Engineering and Analysis Division (WH-552), U.S. EPA, 401 M Street SW., Washington, DC 20460, (202) 260-5834.

#### SUPPLEMENTARY INFORMATION:

##### Overview

The preamble describes the scope, purpose, legal authority and background of this rule, the technical and economic bases and the methodology used by the Agency to develop these effluent limitations guidelines and standards.

The regulations proposed today are supported by EPA's technical conclusions which are detailed in the "Development Document for Best Available Technology, Pretreatment Technology, and New Source Performance Technology in the Pesticide Chemicals Industry". The Agency's economic analysis is presented in the "Economic Impact Analysis of Effluent Limitations Guidelines and Standards for the Pesticide Chemicals Industry" and in the "Cost-Effectiveness of Proposed Effluent Limitations Guidelines and Standards of Performance for the Pesticide Manufacturing Industry". Abbreviations, acronyms, and other terms used in the **SUPPLEMENTARY INFORMATION** section are defined in appendix A to this notice.

#### Organization of This Notice

##### I. Legal Authority

##### II. Background

##### A. Clean Water Act

1. Best Practicable Control Technology Currently Available (BPT)
2. Best Available Technology Economically Achievable (BAT)
3. Best Conventional Pollutant Control Technology (BCT)
4. New Source Performance Standards (NSPS)

##### 5. Pretreatment Standards for Existing Sources (PSES)

##### 6. Pretreatment Standards for New Sources (PSNS)

##### B. Section 304(m) Requirements and Litigation

##### C. Pollution Prevention Act

##### D. Prior Regulation and Litigation for the Pesticide Chemicals Category

##### E. Scope of Today's Proposed Rule

##### III. Summary of Proposed Regulations

##### A. BPT

##### B. BCT

##### C. BAT

##### D. NSPS

##### E. PSES

##### F. PSNS

##### IV. Data Gathering Efforts

##### A. Technical Data

##### 1. PAIs or Classes of PAIs Considered for Regulation

##### 2. Census Questionnaire

##### 3. Sampling and Analytical Programs

##### 4. Bench-Scale Treatability Studies

##### 5. Data Transfer from the OCPSF Rulemaking For Priority Pollutants

##### B. Economic Data

##### V. Overview of the Industry

##### VI. Industry Subcategorization

##### A. Prior Subcategorization Scheme

##### B. Development of Current Subcategorization Scheme

##### C. Proposed Subcategories

##### 1. Organic Pesticide Chemicals Manufacturing

##### 2. Metallo-Organic Pesticide Chemicals Manufacturing

##### VII. Water Use and Wastewater Characterization

##### VIII. Available Wastewater Control and Treatment Technology

##### IX. Best Practicable Control Technology Currently Available

##### A. Need for Revisions to the Applicability of the BPT Limitations in Subcategory A

##### X. Best Conventional Pollutant Control Technology

##### A. July 9, 1986 BCT Methodology

##### B. BCT Options Identified

##### XI. Best Available Technology Economically Achievable

##### A. Need for BAT Regulation

##### B. BAT Technology Options and Selection

##### 1. Option 1: Treated Discharge

##### 2. Option 2: Zero Discharge

##### C. Calculation of BAT

##### 1. Subcategory A Plants

##### a. Organic Pesticide Active Ingredients

##### b. Priority Pollutants

##### c. Volatile and Semi-Volatile Organic Pollutants

##### d. Lead

##### e. Reliance on End-of-Pipe Biological Treatment

##### f. Remanded OCPSF Priority Pollutant Limitations

##### g. Four Brominated Pollutants and Cyanide

##### h. Use of Steam Stripping as the Basis for Limitations

##### 2. Subcategory B Plants



- D. Applicability of BAT Limitations
- E. BAT Pollutant Removals, Costs, and Economic Impacts
- XII. New Source Performance Standards
  - A. Need for NSPS Regulation
  - B. NSPS Technology Options and Selection
    - 1. Option 1: Treated Discharge
    - 2. Option 2: Zero Discharge
  - C. Applicability of NSPS
- XIII. Pretreatment Standards for Existing Sources
  - A. Need for Pretreatment Standards
  - B. PSES Technology Options and Selections
    - 1. Option 1: Treated Discharge
    - 2. Option 2: Zero Discharge
  - C. Calculation of PSES
  - D. Applicability of PSES Limitations
  - E. Removal Credits
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#### I. Legal Authority

This regulation is being proposed under the authorities of sections 301, 304, 306, 307, and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 et seq., as amended by the Clean Water Act of 1977, Pub. L. 95-217, and the Water Quality Act of 1987, Pub. L. 100-4), also referred to as "the Act."

#### II. Background

##### A. Clean Water Act

The Federal Water Pollution Control Act Amendments of 1972 established a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," (section 101(a)). To implement the Act, EPA is to issue effluent limitations guidelines, pretreatment standards and new source performance standards for industrial dischargers.

These guidelines and standards are summarized briefly below:

1. *Best Practicable Control Technology Currently Available (BPT)*—(section 304(b)(1) of the Act). BPT effluent limitations guidelines are generally based on the average of the best existing performance by plants of various sizes, ages, and unit processes within the category or subcategory for control of pollutants.

In establishing BPT effluent limitations guidelines, EPA considers the total cost of achieving effluent reductions in relation to the effluent reduction benefits, the age of equipment and facilities involved, the processes employed, process changes required, engineering aspects of the control technologies, non-water quality environmental impacts (including energy requirements) and other factors as the EPA Administrator deems appropriate (section 304(b)(1)(B) of the Act). The Agency considers the category or subcategory-wide cost of applying the technology in relation to the effluent reduction benefits. Where existing performance is uniformly inadequate, BPT may be transferred from a different subcategory or category.

2. *Best Available Technology Economically Achievable (BAT)*—

(sections 304(b)(2)(B) and 307(a)(2) of the Act). In general, BAT effluent limitations represent the best existing economically achievable performance of plants in the industrial subcategory or category. The Act establishes BAT as the principal national means of controlling the direct discharge of priority pollutants and nonconventional pollutants to navigable waters. The factors considered in assessing BAT include the age of equipment and facilities involved, the process employed, potential process changes, and non-water quality environmental impacts (including energy requirements), section 304(b)(2)(B)). The Agency retains considerable discretion in assigning the weight to be accorded these factors. As with BPT, where existing performance is uniformly inadequate, BAT may be transferred from a different subcategory or category. BAT may include process changes or internal controls, even when these technologies are not common industry practice.

3. *Best Conventional Pollutant Control Technology (BCT)*—(section 304(a)(4) of the Act). The 1977 Amendments added section 301(b)(2)(E) to the Act establishing BCT for discharges of conventional pollutants from existing industrial point sources. Section 304(a)(4) designated the following as conventional pollutants: Biochemical oxygen demanding pollutants (BOD), total suspended solids (TSS), fecal coliform, PH, and any additional pollutants defined by the Administrator as conventional. The Administrator designated oil and grease as an additional conventional pollutant on July 30, 1979 (44 FR 44501).

BCT is not an additional limitation, but replaces BAT for the control of conventional pollutants. In addition to other factors specified in section 304(b)(4)(B), the Act requires that BCT limitations be established in light of a two part "cost-reasonableness" test. [*American Paper Institute v. EPA*, 660 F.2d 954 (4th Cir. 1981)]. EPA's current methodology for the general development of BCT limitations was issued in 1986 (51 FR 24974; July 9, 1986).

4. *New Source Performance Standards (NSPS)*—(section 306 of the Act). NSPS are based on the best available demonstrated treatment technology. New plants have the opportunity to install the best and most efficient production processes and wastewater treatment technologies. As a result, NSPS should represent the most stringent numerical values attainable through the application of the best available control technology for all pollutants (i.e., conventional,



nonconventional, and priority pollutants). In establishing NSPS, EPA is directed to take into consideration the cost of achieving the effluent reduction and any non-water quality environmental impacts and energy requirements.

5. *Pretreatment Standards for Existing Sources (PSES)*—(section 307(b) of the Act). PSES are designed to prevent the discharge of pollutants that pass through, interfere with, or are otherwise incompatible with the operation of publicly owned treatment works (POTWs). The Act requires pretreatment standards for pollutants that pass through POTWs or interfere with POTWs' treatment processes or sludge disposal methods. The legislative history of the 1977 Act indicates that pretreatment standards are to be technology-based and analogous to the BAT effluent limitations guidelines for removal of toxic pollutants. For the purpose of determining whether to promulgate national category-wide pretreatment standards, EPA generally determines that there is pass-through of a pollutant and thus a need for categorical standards if the nation-wide average percent of a pollutant removed by well-operated POTWs achieving secondary treatment is less than the percent removed by the BAT model treatment system.

The General Pretreatment Regulations, which set forth the framework for the implementation of categorical pretreatment standards, are found at 40 CFR part 403. (Those regulations contain a definition of pass-through that addresses localized rather than national instances of pass-through and does not use the percent removal comparison test described above. See 52 FR 1586, January 14, 1987.)

6. *Pretreatment Standards for New Sources (PSNS)*—(section 307(b) of the Act). Like PSES, PSNS are designed to prevent the discharges of pollutants that pass through, interfere with, or are otherwise incompatible with the operation of POTWs. PSNS are to be issued at the same time as NSPS. New indirect dischargers, like the new direct dischargers, have the opportunity to incorporate into their plants the best available demonstrated technologies. The Agency considers the same factors in promulgating PSNS as it considers in promulgating NSPS.

#### B. Section 304(m) Requirements and Litigation

Section 304(m) of the Clean Water Act (33 U.S.C. 1314(m)), added by the Water Quality Act of 1987, requires EPA to establish schedules for (i) reviewing and revising existing effluent limitations

guidelines and standards ("effluent guidelines"), and (ii) promulgating new effluent guidelines. On January 2, 1990, EPA published an Effluent Guidelines Plan (55 FR 80), in which schedules were established for developing new and revised effluent guidelines for several industry categories. One of the industries for which the Agency established a schedule was the Pesticide Chemicals category.

Natural Resources Defense Council, Inc. (NRDC) and Public Citizen, Inc., challenged the Effluent Guidelines Plan in a suit filed in U.S. District Court for the District of Columbia (*NRDC et al. v. Reilly*, Civ. No. 89-2980). The plaintiffs charged that EPA's plan did not meet the requirements of sec. 304(m). A Consent Decree in this litigation was entered by the Court on January 31, 1992. The Decree requires, among other things, that EPA propose effluent guidelines for the manufacturing subcategories of the Pesticide Chemicals category by March, 1992, and take final action by July, 1993.

#### C. Pollution Prevention Act

In the Pollution Prevention Act of 1990 (42 U.S.C. 13101 et seq., Public Law 101-508, November 5, 1990), Congress declared pollution prevention the national policy of the United States. The Act declares that pollution should be prevented or reduced whenever feasible; pollution that cannot be prevented should be recycled or reused in an environmentally safe manner wherever feasible; pollution that cannot be recycled should be treated; and disposal or release into the environment should be chosen only as a last resort.

#### D. Prior Regulation and Litigation for the Pesticide Chemicals Category

EPA promulgated BPT for the Pesticides Chemicals Manufacturing Category on April 25, 1978 (43 FR 17776; 40 CFR part 455), and September 29, 1978 (43 FR 44846; 40 CFR part 455, subpart A). The BPT effluent limitations guidelines established limitations for chemical oxygen-demand (COD), BOD<sub>5</sub>, TSS, and pH for wastewaters discharged by the organic pesticide active ingredient (PAI) manufacturing subcategory (Subcategory A), except that discharges of these pollutants resulting from the manufacture of 25 organic PAIs and classes of PAIs were specifically excluded from the limitations. In addition, BPT set a limitation for this subcategory on total pesticide discharge which was applicable to the manufacture of 49 specifically listed organic PAIs. BPT limitations requiring zero discharge of process wastewater pollutants were set

for metallo-organic PAIs containing arsenic, mercury, cadmium, or copper.

Several industry members challenged the BPT regulation on April 26, 1978 and the U.S. Court of Appeals remanded them on two minor issues [*BASF Wyandotte Corp. v. Costle*, 596 F.2d 637 (1st Cir. 1979), cert. denied, *Eli Lilly v. Costle*, 444 U.S. 1096 (1980)]. The Agency subsequently addressed the two issues on remand and the Court upheld the regulations in their entirety [*BASF Wyandotte Corp. v. Costle*, 614 F.2d 21 (1st Cir. 1980)].

On November 30, 1982, EPA proposed additional regulations to control the discharge of wastewater pollutants from pesticide chemical operations to navigable waters and to POTWs (47 FR 53994). The proposed regulations included effluent limitations guidelines based upon BPT, BAT, BCT, NSPS, PSES, and PSNS. The proposed effluent limitations guidelines and standards covered the organic pesticide chemicals manufacturing segment, the metallo-organic chemicals manufacturing segment and the formulating/packaging segment of the pesticide chemical industry. In addition, the Agency proposed guidelines for test procedures to analyze the nonconventional pesticide pollutants covered by these regulations on February 10, 1983 (48 FR 8250).

Based on the new information collected by EPA in response to the comments on the November 30, 1982 proposal, on June 13, 1984, EPA published a Notice of Availability (NOA) of new information (49 FR 24492). In this NOA, the Agency indicated it was considering changing its approach to developing regulations for this industry. EPA requested comments on the data. EPA published a second NOA of new information on January 24, 1985, which primarily made available for public review technical and economic data which had previously been claimed confidential by industry.

EPA issued a final rule on October 4, 1985, that limited the discharge of pollutants into navigable waters and into POTWs (50 FR 40672). The regulation included effluent limitations guidelines and standards for the BAT, NSPS, PSES, and PSNS levels of control for new and existing facilities that were engaged in the manufacture and/or formulation and packaging of pesticides. The regulation also established analytical methods for 61 PAIs for which the Agency had not previously promulgated approved test procedures.

Several parties filed petitions in the Court of Appeals challenging various aspects of the pesticide regulation



[*Chemical Specialties Manufacturers Association, et al. v. EPA* (86-8024)]. After a review of the database supporting the regulation the Agency found flaws in the basis for these effluent limitations guidelines and standards. Subsequently, the Agency and the parties filed a joint motion for a voluntary remand of the regulation in the Eleventh Circuit Court of Appeals. The Court dismissed the case on July 25, 1986, in response to the Joint Motion.

Upon consideration of the parties' motion to modify the dismissal, on August 29, 1986, the Court modified its order to clarify the terms of the dismissal. The Eleventh Circuit Court of Appeals ordered that:

(1) The effluent limitation guidelines and standards for the pesticide chemicals industry be remanded to EPA for reconsideration and further rulemaking; and

(2) EPA publish a *Federal Register* notice removing the remanded pesticide regulation from the *Code of Federal Regulations*. EPA formally withdrew the regulations from the *Code of Federal Regulations* on December 15, 1986 (51 FR 44911). Although no errors were found in the analytical methods promulgated October 4, 1985, these methods were also withdrawn to allow for further testing and possible revision. The BPT limitations that were published on April 25, 1978 and September 29, 1978 were not affected by the withdrawal notice and remain in effect. Those existing regulations are not proposed to be changed in today's notice and EPA does not request and will not evaluate public comments on them.

#### E. Scope of Today's Proposed Rule

The regulation proposed today covers two manufacturing subcategories of the pesticide chemicals industry:

- *Subcategory A:* Manufacturers of organic pesticide chemicals; and
- *Subcategory B:* Manufacturers of metallo-organic pesticide chemicals.

EPA will address the Pesticide Chemicals Formulating and Packaging subcategory at a later date.

In today's notice, EPA is proposing to expand water pollution control requirements for the organic pesticide chemicals manufacturing subcategory by establishing effluent limitations guidelines and standards for BAT, NSPS, PSES, and PSNS for new and existing facilities that are engaged in the manufacture of organic pesticide chemicals. In addition, BCT for conventional pollutants is proposed to be set equal to BPT for the organic pesticide chemicals manufacturing subcategory.

For the metallo-organic pesticide chemicals manufacturing subcategory, current BPT limitations require no discharge of process wastewater pollutants. EPA is today proposing to reserve BCT, BAT, NSPS, PSES, and PSNS effluent limitations for this subcategory.

The proposed effluent limitations guidelines and standards are intended to cover discharges generated during the manufacture of PAIs from chemical reactions. (For one PAI, the effluent guidelines apply only to discharges of wastewater generated during the purification of that PAI to a higher quality PAI product.) These guidelines do not apply to the production of pesticide products through the physical mixing, blending, or dilution of PAIs without an intended chemical reaction (except where dilution is a necessary step following chemical reaction to stabilize the product), nor do these regulations apply to packaging or repackaging of pesticide products. These two types of operations are part of the Pesticide Chemicals Formulating and Packaging Subcategory which will be covered under a separate rulemaking at a later date. These regulations also do not apply to the manufacturer of chemicals ("intermediate") which are not pesticides but which subsequently are converted by further chemical reactions to pesticide active ingredients. The "intermediates" are covered by the Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) effluent guidelines (40 CFR parts 414 and 416).

### III. Summary of Proposed Regulations

#### A. BPT

The BPT regulations promulgated in 1978, which limit discharges from the manufacture of certain specified PAIs, are not being changed. However, EPA is proposing to extend the existing subcategory A BPT numeric limitations to apply to discharges from the manufacture of fifteen organic PAIs and organo-tin PAIs, which were previously excluded or omitted from the organic pesticides chemicals manufacturing category. Information collected and developed on direct dischargers demonstrates that all manufacturers of these 15 organic PAIs and organo-tin PAIs are already subject to permit limitations equal to or more stringent than the BPT Subcategory A limitations; the limitations in these permits were developed on a "best professional judgment" basis, using the existing BPT limitations as guidance. The BPT numeric limitations for the organic pesticide manufacturing subcategory for BOD, COD, TSS, and pH are proposed

to apply to those fifteen organic PAIs and to all organo-tin PAIs. BPT is discussed in more detail in Section IX below.

#### B. BCT

EPA is proposing to set BCT for conventional pollutants equal to BPT for subcategory A. The Agency is proposing to reserve BCT for the Subcategory B, metallo-organic pesticide chemicals manufacturing subcategory.

The technology basis for BPT, for subcategory A, includes flow equalization and biological treatment followed by clarification to remove BOD, COD, and TSS. Options for further removal of TSS and/or BOD, given consideration for evaluation as BCT candidate technologies included further biological oxidation (increased retention times), settling ponds, and multimedia filtration. However, BOD and TSS removals beyond BPT levels using these technologies have not been demonstrated as achievable by pesticide manufacturing facilities, and therefore these technologies are not proposed as a basis for BCT. Multimedia filtration was deemed a technologically feasible option for BCT, but the addition of filtration technology fails the BCT cost-reasonableness test and is therefore not being proposed as a basis for BCT. BCT is discussed in more detail in section X below.

#### C. BAT

EPA is proposing to set BAT limitations for subcategory A. EPA is proposing to reserve BAT for Subcategory B.

EPA based the proposed BAT limitations for subcategory A on the use of the following treatment technologies: hydrolysis, activated carbon, chemical oxidation, resin adsorption, solvent extraction, distillation, and/or incineration to control the discharge of PAIs in wastewater. EPA has also based the proposed BAT limitations on recycle/reuse where possible. For some PAIs, compliance with the proposed BAT limitations may require improvements to treatment technologies currently in place at facilities by enhancing the operations, such as hydrolysis with increased retention time and carbon adsorption with increased retention time. BAT effluent limitations for priority pollutants are being proposed based on the use of model control technologies identified in the OCPSF effluent guidelines. BAT is discussed in more detail in section XI of today's proposed rulemaking.



**D. NSPS**

EPA is proposing to establish NSPS for subcategory A PAIs based on BAT limitations for these PAIs, but modified to reflect a wastewater flow reduction of 28 percent for new processes in certain cases. The NSPS proposed for priority pollutants are being set equal to the BAT limitations for subcategory A priority pollutants. The Agency proposes to reserve NSPS for Subcategory B. NSPS are discussed in more detail in section XII below.

**E. PSES**

EPA is proposing to establish PSES for subcategory A equal to BAT limitations for PAIs. Proposed PSES for priority pollutants are primarily based on a direct transfer of the OCPSF pretreatment standards. The Agency is proposing to reserve PSES for Subcategory B. PSES is discussed in more detail in section XIII of today's proposed rule.

**F. PSNS**

The Agency is proposing to set PSNS for subcategory A as follows: (1) The same PAIs are proposed for regulation under PSNS for this subcategory as are proposed for NSPS; and (2) the same priority pollutants regulated by PSNS under the OCPSF guidelines are proposed for regulation. PSNS proposed for PAIs in subcategory A are being set equal to NSPS. PSNS proposed for priority pollutants are being set equal to the OCPSF PSNS levels. The Agency is proposing to reserve PSNS for Subcategory B. PSNS are discussed in more detail in section XIV of today's proposed rule.

**IV. Data Gathering Efforts****A. Technical Data**

The technical data gathering efforts for this rulemaking involved several activities which are summarized briefly in this section and in the technical Development Document for today's proposed rule. In general, EPA's data gathering efforts were conducted by three principal means: (1) Review of existing information pertaining to the pesticides chemicals manufacturing industry and procurement of additional information through a questionnaire census of the industry; (2) implementation of a wastewater sampling and analysis program; and (3) implementation of bench-scale treatability studies. These are described further below.

**1. PAIs or Classes of PAIs Considered for Regulation**—For the Pesticide Chemicals Manufacturing Category, there are 270 PAIs or classes of PAIs

that EPA considered for regulation. The initial basis for this list was the 284 PAIs and classes of PAIs presented in appendix 2 of the October 4, 1985 regulation (50 FR 40672) which were originally selected in 1977 on the basis of significant production and/or commercial use. EPA then expanded this list to 835 PAIs by adding the following groups of PAIs:

- All salts and esters of listed organic acids (such as 2,4-D);
- All metallo-organic PAIs (consisting of an organic portion bonded to arsenic, cadmium, copper, or mercury);
- All organo-tin PAIs;
- All PAIs that appeared to be structurally similar to other listed PAIs (such as organo-phosphorus pesticides); and
- Any other PAIs with an analytical method previously demonstrated to be applicable to wastewater.

EPA excluded from this list of 835 PAIs those PAIs already subject to regulation under other effluent guidelines—specifically, those regulated by OCPSF (40 CFR part 414), Inorganic Chemicals Manufacturing (40 CFR part 415), and Pharmaceuticals (40 CFR part 439). Information provided to EPA under the Federal Insecticide, Fungicide, and Rodenticide Act, indicated that 335 of those 835 PAIs were produced for domestic use in 1984–1985, and the other 500 were not produced for domestic use in either 1984 or 1985. An additional 15 (of the 835) were added to the 335 PAIs because those 15 PAIs had been manufactured prior to 1984 and might still be manufactured for export. The list of 350 PAIs and derivatives, such as salts and esters, was then consolidated by putting salts and esters of a PAI into a PAI class, to arrive at a total of 270 PAIs and classes of PAIs. Because the consolidated classes include all elements of the class, such as all salts and esters of 2,4-D (i.e., not just those in use in 1986), the 270 PAIs and classes of PAIs actually include 606 of the 835 specific PAIs. The final list of 270 PAIs and classes of PAIs considered for regulation is shown in Table 1 of today's proposed rulemaking.

**2. Census Questionnaire.** Under the authority of section 308 of the Clean Water Act, EPA sent a questionnaire in 1988 to 247 facilities that the Agency had identified as possible manufacturers of PAIs. These 247 facilities included all 120 facilities included in the database for the remanded regulation. The Agency received responses from all 247 facilities indicating that 90 facilities manufactured pesticides in 1986 and the other 157 facilities did not manufacture PAIs. The questionnaire specifically requested information on: (1) The PAI

manufacturing processes used; (2) the quantity, treatment, and disposal of wastewater generated during PAI manufacturing; (3) analytical monitoring data available for PAI manufacturing wastewater; (4) information on treatability studies performed by or for facilities; (5) the degree of co-treatment (treatment of pesticide manufacturing wastewater with wastewater from other industrial manufacturing operations at the facility); and (6) the extent of wastewater recycling and/or reuse at the facility. Information was also obtained through follow-up telephone calls and written requests for clarification of questionnaire responses. EPA also requested that pesticide manufacturing facilities submit wastewater monitoring data in the form of individual data points rather than monthly aggregates. These wastewater monitoring data included information on raw pollutant loadings from individual process streams as well as pollutant loadings following wastewater treatment. Industry-supplied data from 27 facilities covering 55 PAIs were evaluated for use in determining treatment system performance. Information obtained by the questionnaire, entitled "Pesticide Manufacturing Facility Census for 1986" (Facility Census) is summarized in the Development Document for today's proposed rule.

**3. Sampling and Analytical Programs.** Between 1988 and 1991, EPA visited 32 of the 90 manufacturing facilities. During each visit, EPA gathered production process information and waste and wastewater treatment generation, treatment and disposal information. Based on these data and the responses to the facility census, EPA conducted wastewater sampling at 20 of the 32 facilities in order to characterize process discharges and treatment system performance. In addition, EPA collected wastewaters for bench-scale treatability studies at seven of the 32 facilities. Four of these seven were among the 20 facilities sampled in order to characterize process discharges and treatment system performance. Therefore, overall, EPA collected wastewater samples at 23 of the 32 facilities visited. The other nine facilities visited were not sampled: two plants do not discharge wastewater (they recycle/reuse their wastewater), two plants had no wastewater treatment, three plants had pesticide manufacturing process wastewater so intimately commingled with wastewaters from other manufacturing processes that sampling for characterization was not possible, one plant disposed of wastewater by



deep well injection, and the ninth plant was not in production during possible sampling times (the ninth plant did provide long-term self-monitoring data, however).

During the sampling activities, raw wastewaters from the manufacture of 38 different PAIs were characterized. Samples were also collected to assist in the evaluation of the performance of 62 specific treatment unit operations. Through the treatability studies, EPA analyzed the efficacy of activated carbon adsorption, membrane filtration, hydrolysis and alkaline chlorination for control of 76 PAIs. More detailed studies using actual manufacturing process wastewater to develop additional treatment performance data for activated carbon adsorption, hydrolysis, and alkaline chlorination technologies were subsequently conducted. These more detailed studies involved 13 specific PAIs included in today's proposed rule.

Facilities were initially selected for sampling based on data which indicated that (1) the wastewater treatment system was effective in removing PAIs, and (2) the PAIs manufactured appeared to be representative of one or more PAI structural categories, such as organophosphate PAIs. Wastewaters containing PAIs in 21 structural groups were sampled.

Because treatability data were lacking for some PAIs, individual PAIs, which were expected to be treatable with a specific technology, were targeted for treatability studies. EPA collected samples of actual pesticide manufacturing process wastewater at plants manufacturing those PAIs. Following sample collection, the samples were transferred to an EPA contractor for bench-scale testing. The data were then used to develop limitations for these PAIs when it was demonstrated that the technology was effective at PAI removal.

**4. Bench-Scale Treatability Studies.** EPA conducted a number of bench-scale studies to evaluate the treatability of PAIs by various wastewater treatment technologies, including: hydrolysis, membrane filtration, chemical oxidation, and activated carbon adsorption. Treatability studies were conducted on both clean water to which PAIs were added ("synthetic wastewaters") and on actual pesticide process wastewaters.

The hydrolysis, membrane filtration, and carbon isotherm treatability studies used synthetic wastewaters. General factors in EPA's selection of specific PAIs for use in the synthetic wastewaters were the availability of an analytical method for the specific PAI and the ready availability of the PAI in

a pure form from either government or commercial sources.

The hydrolysis studies were conducted in some cases to confirm the results of literature hydrolysis data for certain PAIs, and in other cases were conducted because of the lack of any literature data, to fill in those gaps. All of the PAIs selected were expected to hydrolyze under some conditions.

In the hydrolysis treatability study, EPA conducted a series of bench-scale tests to determine the hydrolysis rates of selected PAIs. Thirty-eight (38) PAIs were selected for testing and separated into four synthetic test solutions. The hydrolysis treatability study was conducted under six conditions using a matrix of three pH levels (2, 7, and 12) and two different temperatures (20 °C and 60 °C).

The carbon isotherm studies used PAIs selected from various structural groups to determine which groups would be most amenable to activated carbon technology. Some manufacturers of some PAIs in a few of those groups were known to use activated carbon technology to treat the wastewaters and treatability data from those manufacturers was available; in this case, the purpose of the carbon isotherm studies was to establish benchmarks for determining the potential efficacy of activated carbon technology to other structural groups. Another factor in selecting the PAIs for these studies was the hydrolysis rate of the PAI: A too rapid hydrolysis rate could destroy the PAI before chemical analysis of the samples is complete. The results of the isotherm tests were evaluated using the Freundlich isotherm equation.

The membrane filtration studies used PAIs selected to span the molecular weight range of the 270 PAIs and classes of PAIs under consideration for regulation, because the effectiveness of membrane filtration tends to vary with molecular weight. In the membrane filtration treatability studies, EPA conducted a series of bench-scale tests to identify specific PAIs which could be separated from water by various membrane materials. Synthetic test solutions containing 19 PAIs were tested on seven different types of membranes. The membranes were manufactured from three types of materials (cellulose acetate, thin-film composite, and Aramid) and were of various pore sizes, with nominal molecular weight cut-offs ranging from 150 to 500.

The treatability studies using actual pesticide manufacturing process wastewater were conducted to supplement full-scale treatment system performance data, to fill in gaps in performance data where no treatability

data were available for the PAI, and to help assess performance of existing full-scale treatment systems where the performance of those systems appeared to be inadequate compared to performance of other facilities treating the same or similar PAIs. The PAIs selected for study were the PAIs in production at the plants during the treatability study.

EPA also conducted activated carbon treatability studies to determine adsorption properties of selected PAIs. These studies included carbon adsorption isotherm tests and accelerated column tests which are used in estimating full-scale carbon system designs and cost.

One series of chemical oxidation treatability studies was conducted to determine the applicability of alkaline chlorination as a method of treating pesticide manufacturing process wastewaters. In these bench-scale tests, manufacturing wastewaters from six PAI manufacturing processes were tested at chlorine dosages equal to 50, 100, and 125% of the chlorine demand for the specific wastewater at pH 12, and ambient temperatures. Contact times of 0.5, 1.5, and 4.0 hours were examined.

Because alkaline chlorination of wastewater containing organic matter may generate volatile organic toxic pollutants, which must subsequently be controlled, EPA also conducted chemical oxidation treatability studies for five of those same six PAIs using ozone rather than chlorine. The preliminary results of those studies indicate that ozone can achieve about the same degree of PAI reduction as chlorine. Chemical oxidation with ozone is usually more expensive than chemical oxidation with chlorine. However, ozone oxidation does not produce volatile toxic pollutants. When the cost of controlling those volatile toxic pollutants is added to the cost of alkaline chlorination, the total cost for chlorination may exceed the cost of ozone oxidation.

**5. Data Transfer From the OCPSF Rulemaking for Priority Pollutants—**The Clean Water Act of 1977 stressed the control of toxic pollutants, including 65 toxic pollutants and classes of pollutants. From this list of 65, EPA has derived a subset of 126 individual "priority" pollutants on which the Agency has focused (see, e.g., list of 126 priority pollutants at 40 CFR part 423, appendix A). EPA has determined that 28 of the 126 priority pollutants may be present in pesticides manufacturers wastewaters, and EPA is proposing today to set direct discharge limitations and pretreatment standards for these 28



priority pollutants. For 23 of these 28 priority pollutants, EPA is relying on the OCPSF technical database to propose limitations. Limitations for one priority pollutant, cyanide, are proposed based on long-term data collected from the pesticide industry. The other four priority pollutants being proposed for regulation today were not regulated under OCPSF and there are no treatment performance data for these four specific pollutants. EPA developed proposed limitations for these four priority pollutants by transferring limitations from other structurally similar priority pollutants. This is the same procedure that was used in developing OCPSF limitations (40 CFR part 414) when performance data was lacking for certain priority pollutants.

Limitations were developed under the OCPSF rulemaking for 23 priority pollutants that were also detected in pesticide manufacturers' wastewaters during the EPA sampling and industry self-monitoring. Fifty-five (55) of the 90 pesticide chemicals manufacturing facilities also manufacture compounds regulated under the OCPSF category. Based on these factors, EPA is proposing that technical data from the OCPSF category and effluent limitations for priority pollutants based on that data be transferred to the pesticide chemicals manufacturing category as supporting data for the proposed limitations for the priority pollutants in this regulation.

The 23 priority pollutants for which EPA is relying on the OCPSF database to set BAT and NSPS limitations for the pesticide chemicals manufacturing category are presented in appendix B of today's proposed rule. The OCPSF limitations for volatile priority pollutants were based on data from plants that exhibited efficient volatile pollutant reduction using either in-plant steam stripping technologies alone or in-plant steam stripping followed by biological treatment. OCPSF limitations were also based on activated carbon or in-plant biological treatment for some semi-volatile organic priority pollutants. The OCPSF guideline established limitations for lead based on performance data obtained from EPA's study of the metal finishing industry.

EPA is also proposing to transfer PSES and PSNS standards and data supporting those standards from the OCPSF category for the same 23 priority pollutants. EPA is relying on an analysis originally done to support the OCPSF regulations to determine pass-through for these pollutants. That analysis demonstrates that 21 of the 23 priority pollutants do pass through a POTW. Therefore, EPA is proposing PSES and

PSNS for 21 of those 23 pollutants. The priority pollutants for which EPA is relying on the OCPSF database to set limitations for PSES and PSNS for the pesticide chemicals manufacturing category can also be found in appendix B for today's proposed rule.

Only technical data used to develop limitations are being transferred from the OCPSF rulemaking for these 23 priority pollutants. The economic analysis evaluating whether attainment of these limitations is economically achievable by pesticides manufacturers has been performed independently as part of today's proposed rule.

EPA is also proposing BAT, NSPS, PSES and PSNS limitations for four brominated priority pollutants that appear in pesticides manufacturers' wastewaters but which are not regulated under the OCPSF guidelines. The proposed limitations were developed based on steam stripping, using the same procedure followed in developing the OCPSF regulations for volatile pollutants where treatment performance data were unavailable (as described below).

In the OCPSF regulation, EPA established effluent limitations for 28 volatile priority pollutants based on steam stripping technology, but EPA had performance data for only 15 of those 28 priority pollutants. To develop limitations for the 13 priority pollutants with no performance data, EPA divided the 15 priority pollutants with data into two subgroups, a high "stripability" subgroup and a medium "stripability" subgroup, based on Henry's Law Constants (a ratio of aqueous solubility, or tendency to stay in solution, to vapor pressure, or tendency to volatilize). Based on each pollutant's Henry's Law Constant, the 13 priority pollutants lacking performance data were assigned to either the high or medium stripability subgroup, and the average data for each subgroup was then transferred for limitations development. (For more details, see 52 FR 42540-41, November 5, 1987.)

This same procedure was followed for each of the four brominated volatile priority pollutants for which limitations are proposed today.

#### B. Economic Data

The principal source of data used to predict economic impacts was the questionnaire census of pesticide manufacturing facilities. The census included facilities that, in 1986, manufactured one or more of the 270 pesticide active ingredients that were considered within the scope of the proposed regulation. The questionnaire consisted of two parts: Part A requested

data (for 1986) necessary to perform the technical and treatment cost estimation analysis, including active ingredient-specific production. Part B of the questionnaire requested detailed economic and financial data, including balance sheet and income information for 1985, 1986, and 1987. Part B was also designed to obtain information on plant liquidation values and cost of capital. The technical data section of the questionnaire (part A) and the economic data section (part B) were administered at different times. This timing difference, and new information obtained by EPA, resulted in 90 pesticide manufacturing facilities completing part A of the questionnaire while 88 pesticide manufacturing facilities completed part B. In part B of the questionnaire, respondents had the option of providing or not providing active ingredient-specific unit variable cost, unit sales, production quantity, and export percentages. The questionnaire informed facilities that chose not to provide these active ingredient-specific data that EPA would assess the economic impacts for that facility based on financial averages calculated from the facility-level data that they submitted.

The database developed from the questionnaire was used to evaluate various measures of economic impacts including facility closures, product line closures, facility profitability impacts, facility ability to incur debt, firm-level impacts, community impacts, international trade effects, effects on new pesticide manufacturing facilities, and impacts on small businesses. In addition to using data from the section 308 questionnaire, EPA's analysis of economic impacts employed data from several secondary sources. The facility-level impact analysis used secondary price data from "Doane Marketing Research's Annual Marketing Survey" and from DPRA's "Agchemprice." The facility-level impact analysis also employed data collected by EPA pursuant to the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. 136 et seq.). The FIFRA data was used to estimate prices as well as to figure the percentage of pesticides production that is outside of the scope of the regulation. In addition, the facility-level analysis used estimates of the price elasticity of demand for pesticides developed by EPA (1991) and presented in appendix C of the Economic Impact Analysis titled "Estimates of the Price Elasticity of Demand for Pesticide Clusters." The community impact analysis required population data from the "Statistical Abstract of the United States" (U.S. Department of Commerce)



and employment rates obtained from the Bureau of Labor Statistics. The foreign trade analysis used import data collected under FIFRA as well as data on the U.S. trade balance from the "International Trade Statistics Yearbook" (United Nations) and the "Statistical Abstract of the United States." The firm-level analysis was developed using financial statistics from Standard and Poor's Compustat service and Robert Morris Associates' "Annual Statement" studies. Finally, the analysis of impacts on small businesses used data on firm-level employment obtained from Dun and Bradstreet's "Million Dollar Directory."

#### V. Overview of The Industry

Today's proposed regulations apply to wastewater discharges from the pesticide chemicals manufacturing industry. According to the Facility Census, there are 90 pesticide chemical manufacturing facilities located in 29 states that reported producing one or more PAIs from the list of 270 PAIs and classes of PAIs considered for regulation by EPA. This industry is included within the U.S. Department of Commerce, Bureau of the Census Standard Industrial Classification (SIC) Major Group 28, Chemical and Allied products. More specifically, facilities manufacturing PAIs may be engaged in one or more of the following SIC groups: 2831, 2833, 2834, 2842, 2843, 2861, 2865, 2869, 2879, and 2899.

A typical facility (as suggested by the Facility Census data) manufactures one active ingredient and is the country's sole producer of that PAI. PAIs are usually produced in the range of 1,000,000 to 10,000,000 pounds, annually. The majority of pesticide manufacturing facilities are located in the eastern half of the United States, with a large concentration in the southeast corridor and Gulf Coast states. Fifty-five of the 90 pesticide chemicals manufacturers also manufacture products subject to OCPSF effluent guidelines.

As a result of the wide variety and complexity of raw materials and processes used to manufacture pesticide active ingredients, many diverse pollutants can be discharged in the wastewaters generated by this industry, including conventional pollutants (BOD, pH, and TSS), priority pollutants, and a large number of nonconventional pollutants (e.g., COD and the PAIs).

Approximately 1.5 billion gallons of process wastewater were discharged by PAI manufacturing processes in 1986. Process wastewater is defined in 40 CFR 122.2 and the Facility Census as "any water which, during manufacturing or processing, comes into direct contact

with or results from the production or use of any raw material, by-product, intermediate product, finished product, or waste product." In general, the primary pesticide manufacturing process wastewater sources are: product, process stream, and equipment washes; air pollution control scrubber blow-down; stream jets and vacuum pumps; pump seal water; and water of reaction. Other potential sources of process wastewater include contaminated storm water, showers, and laundry operations. These secondary sources tend to be intermittent and not found at all plants. Water use and wastewater generation in the pesticide industry are described in more detail in section VII of today's proposed rule.

The 90 facilities identified by the Facility Census can also be characterized by their type of wastewater discharge. Sixty-seven of the 90 facilities are dischargers. Thirty-two facilities discharge wastewater directly into a receiving stream or body of water. Another thirty-six facilities discharge wastewater indirectly, i.e., discharge to a publicly owned treatment works (POTW). One facility is both a direct and indirect discharger of wastewater. Twenty-three facilities do not dispose of wastewaters on-site directly to surface waters or to POTWs. At these facilities, (1) wastewaters are disposed of by alternate means such as on-site or off-site deep well injection or incineration (15 facilities); (2) wastewaters are completely recycled and/or reused (two facilities); or (3) the production process does not use water at all or the production process does not generate wastewater (six facilities). Section VII of today's proposed rulemaking provides a more detailed description of total process wastewater flow by type of discharge (direct, indirect, zero, or both direct and indirect).

The major treatment technologies currently employed by plants in the pesticide chemicals manufacturing industry to treat wastewaters on-site are: biological treatment, activated carbon adsorption, on-site incineration, chemical oxidation/chlorination/dechlorination, hydrolysis, steam stripping, resin adsorption, hydroxide precipitation, and solvent extraction. The treatment technologies used in the pesticide chemicals manufacturing industry include both in-plant and end-of-pipe technologies. In-plant treatment is used to remove certain pollutants, such as the PAIs, from segregated process wastewater streams before these waste streams are combined with other facility wastewater. End-of-pipe treatment systems employ physical,

chemical, and biological treatment and are designed to treat combined process and facility wastewaters. Further discussion of wastewater controls and treatment technologies can be found in the Development Document and in section VIII of today's proposed rule.

#### VI. Industry Subcategorization

##### A. Prior Subcategorization Scheme

In developing today's proposed regulations, it was necessary to determine if different effluent limitations guidelines and standards are appropriate for different segments of the pesticide chemicals manufacturing industry. EPA, in previous rulemaking efforts, evaluated different subcategorization schemes from the one proposed for today's rulemaking. On November 1, 1976, EPA promulgated interim final BPT guidelines for the pesticide chemicals point source category establishing a subcategorization approach which included the following five subcategories:

- The halogenated organic pesticides subcategory (subpart A);
- The organo-phosphorous pesticides subcategory (subpart B);
- The organo-nitrogen pesticides subcategory (subpart C);
- The metallo-organic pesticides subcategory (subpart D); and
- The pesticide formulating and packaging subcategory (subpart E).

On promulgating the interim final BPT regulations, the Agency recognized that certain ambiguities were present in the subcategorization scheme based on chemical structure. Many pesticides contain more than one functional group, such as halogens, phosphorous, sulfur, and nitrogen; and therefore, do not readily fit the interim final BPT subcategorization scheme.

Review of raw waste load characteristics and other factors revealed no consistent pattern between or within chemical family groupings that would provide a basis for subcategorization. Thus, for the final BPT regulation, promulgated April 25, 1978, the Agency consolidated the halogenated organic, organo-phosphorous, and organo-nitrogen pesticide subcategories into a single subcategory, designated as the organic pesticide chemicals manufacturing subcategory. This reduced the original five subcategories to the following three:

- Organic Pesticide Chemicals Manufacturing Subcategory (subpart A);
- Metallo-organic Pesticide Chemicals Manufacturing Subcategory (subpart B);
- and



• Pesticide Chemicals Formulating and Packaging Subcategory (subpart C).

B. Development of Current Subcategorization Scheme

In establishing the subcategories set forth in this rulemaking, EPA took into account all information it was able to collect and develop with respect to the following factors: Product type and raw materials, manufacturing process and process changes, nature of waste generated, dominant product, manufacturing facility size, age, and location, non-water quality impact characteristics, and treatment technologies and costs. In this industry, there are a large number of PAIs that are produced by only one manufacturing facility, as well as a large number of facilities that produce only one or two PAIs each. These manufacturing facilities employ different manufacturing processes and wastewater treatment technologies that are tailored to the production of the specific PAIs produced at their facility. The pesticide chemicals manufacturing industry manufactured 178 distinct PAIs in 1986, and 8 other PAIs were also manufactured during the period 1985-1989, but those 8 were not manufactured in 1986. Therefore, subcategorization based on the manufacturing process or dominant product produced would result in too many subcategories, thus are not appropriate for the purpose of delineating subcategories.

EPA also rejected a number of other factors as a basis for subcategorization. The Agency concluded that manufacturing processes cannot be a basis for subcategorization because it is not possible to sub-divide the wide range of process chemistry and unit operations used to manufacture PAIs. EPA also found that it is impossible to distinguish groups of process changes for the purpose of subcategorization. Process changes occur on an individual plant basis and are usually brought about to improve plant efficiency, although process changes sometimes occur in response to requirements imposed by permit authorities or POTWs. Although the age of a plant can sometimes have a direct bearing on the volume of a wastewater generated, many older facilities have unilaterally improved or modified their process and treatment technologies over time.

Plant size is not a useful basis for subcategorization for the pesticides industry because wastes can be treated to the same concentrations regardless of the number of process operations that take place at a plant or the size of the plant. Plant location is also not a good basis for subcategorization; there are no

consistent differences in wastewater treatment performance or costs because of geographical location. Although non-water quality characteristics (solid waste and air emission effects) are of concern to EPA, these characteristics do not constitute a basis for subcategorization. Environmental impacts from solid waste disposal and from the transport of potentially hazardous wastewaters are a result of individual facility practices and do not reflect a trend that pertains to different segments of the industry. Although air emissions are related to the active ingredients manufactured, most active ingredients are very low in volatility compared to the various solvents used in the manufacturing processes. Since the same solvents are used in manufacturing many different PAIs, therefore, air pollution control problems and specific equipment used to rectify air pollution problems cannot form the basis for any apparent subcategorization. Treatment costs do not appear to be a basis for subcategorization because costs will vary and are dependent on product-specific variables: flow rates, wastewater quality, and pollutant loadings. Therefore, treatment costs were not used as a factor in determining subcategories.

EPA identified two factors that are useful in identifying subcategories for the pesticides chemicals manufacturing industry:

- (1) Product type and raw materials; and
- (2) Nature of waste generated.

Metals or metallic compounds are generally not used as raw materials in the manufacture of organic pesticide chemicals, but such substances are used as raw materials for metallo-organic pesticide chemicals manufacturing. For this reason, wastewaters from metallo-organic pesticide chemicals manufacturing have a much higher concentration of metals and metallo-organic compounds than wastewaters from organic pesticide chemicals manufacturing. The types of treatment technologies effective for treating wastewaters from metallo-organic wastewaters are different from those technologies used to treat organic pesticide chemicals, due to the higher concentrations of metals and metallo-organic compounds in wastewaters from metallo-organic pesticide chemicals. Therefore, product type and raw materials are appropriate bases for subcategorization of this industry.

Based on the data available to EPA on the nature of waste generated, there are no consistent differences in the amount

and identity of pollutants (except for the pesticide active ingredient itself) in waste loads from different organic pesticide chemicals manufacturing facilities. However, manufacturers of metallo-organic pesticide chemicals tend to generate smaller volumes of wastewater per unit of product produced with higher metal concentrations compared to manufacturers of organic pesticide chemicals. Therefore, the nature of the waste generated from pesticide chemicals manufacturing operations is also a basis for subcategorization and is consistent with the previously determined basis described above since it is directly related to the product type and raw materials used.

C. Proposed Subcategories

Based on product type, raw materials, and the nature of waste generated, EPA has defined two subcategories for the pesticide chemicals manufacturing industry. The two subcategories are the same as the manufacturing subcategories contained in the existing 40 CFR part 455 regulations.

1. *Organic Pesticide Chemicals Manufacturing*—This subcategory applies to discharges resulting from the production of carbon-containing PAIs, excluding metallo-organic active ingredients containing arsenic, cadmium, copper or mercury. Although organotin pesticides fit the definition of a metallo-organic pesticide given in the BPT regulation (see § 455.32), organotin pesticides were not included in the metallo-organic pesticide chemicals subcategory (see § 455.31(a)) during the 1978 rulemaking because wastewaters from their manufacture have significantly different wastewater characteristics than wastewaters from the manufacture of metallo-organic pesticides containing arsenic, cadmium, copper, and mercury. EPA does not believe it is appropriate to include the organotin pesticides in the metallo-organic subcategory because their pollutants are different, and the organotin production has larger volumes of wastewater. The amounts and types of pollutants from organotin pesticide manufacture are closer to the amounts and types of pollutants from the manufacture of the organic pesticide chemicals. Therefore, EPA has determined that organotin pesticides should be included in the organic pesticide chemicals manufacturing subcategory. EPA proposes to regulate the following pollutants in this subcategory: conventional pollutants, non-conventional pollutants (including



COD and the PAIs), and priority pollutants.

**2. Metallo-Organic Pesticide Chemicals Manufacturing**—This subcategory applies to discharges resulting from the manufacture of metallo-organic pesticide active ingredients that contain mercury, cadmium, arsenic or copper (see § 455.30 and § 455.31(a)). The three existing direct dischargers in this subcategory are currently subject to BPT effluent limitations requiring zero discharge of process wastewater pollutants. Currently, there are only five existing indirect dischargers in this subcategory.

#### VII. Water Use and Wastewater Characterization

This section describes water use and wastewater characterization at the 90 facilities that reported manufacturing one or more PAIs proposed for regulation. With the exception of certain processes, such as the manufacture of biphenyl and naled, or processes involving solely purification reactions, the manufacture of pesticide active ingredients requires the use of water. PAI manufacturing processes vary with the PAI that is manufactured and with the specific facility where the manufacture takes place, and therefore water use varies widely among facilities. Water is used in pesticide manufacturing processes for several purposes:

- **Water of reaction:** Water is formed during a chemical reaction, such as the reaction of an acid with an alcohol. Less than 1 million gallons of water annually are formed in these reactions.

- **Process solvent:** Water is used as solvent for some or all of the chemicals involved in the reaction process; this water is usually removed from the process through a separations stage, such as centrifugation, filtration, decantation, drying, or stripping. About 200 million gallons of water per year are used as process solvent.

- **Process stream washes:** In order to purify the process stream to allow additional steps in the production process, water is added to the carrier, spent acid, or spent base which has been separated from the reaction mixture. About 200 million gallons of water per year are used for process stream washes.

- **Product washes:** Water is added to the reaction medium in order to remove contaminants and intermediate product, or to remove active ingredient, which is subsequently removed from the water through a separations stage; or water is used to wash the crude product after it has been removed from the reaction

medium. About 500 million gallons per year of product wash water are used.

- **Steam jets or vacuum pumps:** Water contact in the reaction mixture, or solvents, is stripped from the reaction mixture through the operation of a venturi or vacuum pump. About 28 million gallons per year are used for steam jets or vacuum pumps.

- **Air pollution control scrubber blow-down:** Water or acidic or basic solution is used in air emission control scrubbers used to control fumes from reaction vessels, storage tanks, and other process equipment. About 200 million gallons of water per year are discharged as air pollution control scrubber blow-down.

- **Equipment washes:** Water is used to clean process equipment during unit shutdowns. About 23 million gallons of water per year are used for equipment washes.

- **Pump seal water:** Water is used to cool packing and lubricate pumps associated with process equipment. This water may contact pesticide-containing water through leakage and may therefore become pesticide-containing wastewater. About 5 million gallons of pump seal water per year are discharged.

- **General process/unidentified:** Water is generated during the manufacturing process and does not fall into any of the above categories. About 54 million gallons per year of unidentified process water are discharged.

- **Spent Acid/Caustic:** Acid and basic reagents are used to facilitate, catalyze, or participate in the reaction process. Spent acid and caustic streams, which may be primarily water, are discharged from the process during the separation steps which follow the reaction step. About 185 million gallons per year of spent acid/caustic waters are discharged.

A total of approximately 1.45 billion gallons of wastewater is generated annually by pesticide chemicals manufacturers. The majority of water usage (69%) is directly associated with the manufacturing process as product washes or process solvents. Of the 1.45 billion gallons of wastewater generated in 1986 by the manufacture of PAIs studied for today's proposed regulation, 1.28 billion gallons were discharged either directly or indirectly, while the remaining 170 million gallons were disposed of by deep well injection or off-site incineration.

Of the 90 facilities that manufactured those PAIs in 1986, 32 are direct dischargers, 36 are indirect dischargers (There are a total of 67 dischargers because 1 plant is both direct and indirect), 15 dispose of wastewater by

on-site or off-site deep well injection or incineration, and 8 generated no process wastewater by recycle/reuse or no water use. Direct dischargers account for more than 80% of the wastewater discharged.

The manufacture of organic pesticide chemicals and organo-tin pesticides accounted for more than 99% of the wastewater generated or discharged. The manufacture of metallo-organic PAIs containing arsenic, copper or mercury generated only about 15 million gallons of wastewater in 1986 with less than 3.5 million gallons discharged to POTWs. All the rest were disposed of by off-site disposal through deep well injection or delivery to combined waste treatment facilities. No organo-cadmium PAIs were manufactured in 1986.

Recycling of process wastewater during pesticide manufacture in 1986 was reported by 25 of the 90 manufacturing facilities. A total of 29 recycling/reuse operations were reported: Fourteen of the facilities reported recycling/reuse operations which recovered raw material, solvent, or product; ten facilities reported reusing water for manufacturing or formulating/packaging operations, four facilities reported reusing wastewater for equipment washing or as cooling or scrubber water; and one facility reported reusing contaminated storm water in the manufacturing process.

Because of the differences in processes used to manufacture the various PAIs, recycle/reuse operations used by one facility often cannot be used by other facilities manufacturing different PAIs. EPA, or its contractors, visited more than 30 of the 90 plants in the industry and investigated pollution prevention opportunities potentially available through either recycle/reuse or other means. Most of these visits were to plants that also have extensive and effective wastewater treatment systems in place.

EPA has based the proposed effluent limitations on data from plants with extensive treatment and/or recycle/reuse operations in place. It may be to the facilities' advantage to reduce or eliminate pollution at the source rather than to treat wastewater because this may reduce costs for treatment and disposal of wastes while allowing recovery and reuse of process materials. EPA could not identify additional source reduction or recycle/reuse opportunities that were not already in use at the plants visited. The proposed limitations require the facility to meet technology-based standards. Under today's proposed rule, facilities would be encouraged to adopt pollution



prevention measures as a way to comply with performance standards if they found these measures were effective in reducing costs of compliance.

A wide variety of pollutants are discharged in the wastewaters from the pesticide manufacturing industry. Approximately 2.7 million pounds per year of conventional pollutants (BOD and TSS) and 7.2 million pounds per year of the nonconventional pollutant COD are discharged directly by facilities manufacturing organic pesticide chemicals. Because the BOD and TSS discharged by this industry are compatible with POTWs, these parameters are not currently monitored by any of the five indirect dischargers that manufacture metallo-organic pesticides, and, therefore, EPA cannot estimate how much BOD or TSS are discharged to POTWs by these five facilities; these facilities also do not monitor for COD. There are no facilities that discharge process wastewater resulting from the manufacture of organo-arsenic, organo-copper, or organo-mercury PAIs directly to receiving streams.

Approximately 298,000 pounds per year of PAIs are discharged by the organic pesticide chemicals manufacturing subcategory. The metallo-organic pesticide chemicals subcategory discharges about 60 pounds per year of priority pollutants and PAIs to POTWs. Because EPA does not have an analytical method that measures the amount of organo-copper or organo-mercury PAI present in wastewater, the wastewater is monitored by measuring the amount of total copper or total mercury in the wastewater. Because the copper or mercury is an integral and the most significant part of the PAI, EPA believes monitoring of the parent metal (copper in the case of organo-copper PAIs and mercury in the case of organo-mercury PAIs) gives a very good measure of the amount of PAI in the wastewater.

EPA sampled pesticide manufacturing process wastewater at various locations throughout the wastewater generation, treatment, and discharge path at 20 facilities to screen the wastewater for the presence of PAIs and priority pollutants and to evaluate control technology performance. In order to determine the presence of priority pollutants, EPA collected samples over each of three sampling days. A report that there was detection of a priority pollutant in at least two samples at the same location would indicate high probability that the priority pollutant was in fact present, whereas reported

detection of a priority pollutant in only one sample would cast doubt on the presence of that priority pollutant.

Where priority pollutants were reported detected in only one sample at any sample site, EPA used the following procedure to evaluate the report. First, EPA examined samples collected at other sites at the same facility for reported detections for that same pollutant in pesticide manufacturing process wastewater at any of those other sites. Second, EPA examined the details of the production process to determine if the pollutant was a raw material or by-product, or likely contaminant of raw materials or solvents. Finally, EPA contacted knowledgeable plant personnel to determine if the pollutant was a known or likely contaminant, and to determine if the plant had also detected the pollutant during sampling, particularly during sampling conducted the same day EPA sampled and analyzed by the same or a similar analytical method. If EPA could not confirm the presence of the priority pollutant by any of these methods, EPA concluded that the result represented a bad sample and disregarded the result.

EPA sampling at the 20 facilities reported detection of 70 priority pollutants in wastewaters. However, in many cases, the priority pollutants were detected in only one sample at one sample site and the presence of that pollutant could not be confirmed after checking all the sources described above. EPA's conclusion in the cases where reported detections at one sample site could not be confirmed by any means is that the reported results are incorrect and the pollutant is not in fact present.

In addition to EPA sampling, 47 industry facilities in their responses to the Facility Census reported that 60 priority pollutants were detected or believed to be present in wastewaters at these plants, including 14 priority pollutants not detected during EPA sampling. Twenty-two facilities reported that no priority pollutants would be expected in their pesticide manufacturing process wastewater. The other 21 plants did not know whether priority pollutants were present or not.

Both EPA sampling and industry data show that many of the priority pollutants are detected in only trace amounts. At trace levels, the pollutants are not treatable by current technologies, and also are below levels likely to cause any adverse effects. Three priority pollutants (4-nitrophenol, hexachlorobutadiene, and hexachlorocyclopentadiene) were not

detected in process wastewater during EPA sampling. These three priority pollutants would be expected at only a few sites (4-nitrophenol as a result of manufacturing parathion or methyl parathion, the other two pollutants from manufacturing heptachlor). EPA was unable to sample the process wastewaters from manufacturing parathion, methyl parathion or heptachlor because the plants manufacturing these products were not operating during the time available for sampling. The parathion and methyl parathion manufacturer has informed EPA that it does not intend to manufacture either of these two products in the future. The heptachlor manufacturer has also indicated that continued production of heptachlor is uncertain.

Section 5 of the Technical Development Document for today's proposed rule provides additional data on concentrations of priority pollutants found during EPA sampling of pesticide manufacturing process wastewater and also provides industry-supplied data on priority pollutants found in wastewaters.

#### *VIII. Available Wastewater Control and Treatment Technology*

In their responses to the Facility Census, pesticide manufacturers indicated that wastewater treatment systems are operated at 60 of the 90 manufacturing facilities. The treatment technologies used include physical-chemical treatment technologies and biological treatment. Physical-chemical treatment technologies in use are:

- Activated Carbon, which removes pollutants from wastewater by adsorbing them onto carbon particles.
- Chemical Oxidation, which destroys pollutants by oxidizing them to simpler molecules. Chemicals used for chemical oxidation are chlorine, potassium permanganate, and ozone.
- Distillation, which separates water from solvents by boiling the mixture and partially cooling the steam to condense the higher boiling material.
- Evaporation, which separates water from non-volatile pollutants by boiling off the water, leaving the non-volatile pollutants behind.
- Hydrolysis, which destroys pollutants by chemical reaction with alkali in water to produce simpler molecules.
- Incineration, which destroys pollutants by burning them.
- Precipitation/Filtration, which converts soluble metal salts to insoluble metal oxides which are then removed by filtration.



- Resin Adsorption, which removes pollutants from wastewater by adsorbing them onto particles of organic resin.

- Solvent Extraction, which separates pollutants from water by dissolving them into a solvent that does not mix with water.

- Steam Stripping, which removes volatile pollutants from water by heating the water to cause the volatile pollutants to evaporate from the water. The overhead stream contains some evaporated water with the volatile pollutants.

- Ultraviolet Decomposition, which uses sunlight or an ultraviolet lamp to cause pollutants to decompose to simpler molecules.

- Coagulation/Flocculation, which is used to assist clarification of biological treatment effluent.

The typical treatment sequence is physical-chemical treatment to remove PAIs, followed by steam stripping to remove volatile priority pollutants, followed by biological treatment to remove non-volatile priority pollutants and other organic pollutants. The physical-chemical technology used by a plant depends upon the nature of the PAI: Hydrolysis is usually used for organo-phosphorus pesticides and carbamate pesticides, but is ineffective for most other PAIs, while activated carbon is often used for triazine, urea and uracil pesticides, but seldom used in place of hydrolysis for organo-phosphorus and carbamate pesticides. These generalities are not hard and fast rules, however. Many facilities use more than one physical-chemical technology to provide nearly complete destruction or removal of specific PAIs.

At least some treatment is currently being provided to over 99% of the wastewaters discharged directly and to about 92% of the wastewaters discharged to POTWs. While some plants provide extensive treatment to remove PAIs, priority pollutants and other pollutants, some plants provide no treatment. The majority of plants have some treatment but that treatment often needs to be upgraded to improve its effectiveness and to remove additional pollutants.

Treatment technologies currently used by pesticide chemicals manufacturers include both in-plant and end-of-pipe technologies. In-plant treatment is used to remove PAIs and volatile organic priority pollutants from process waste streams before these waste streams are combined with other facility wastewaters for end-of-pipe treatment. In addition, facilities performing recycle/reuse of treated wastewaters do so in many cases following various in-

plant treatment units. End-of-pipe treatment systems employ biological and/or physical/chemical treatment to treat combined facility wastewaters prior to discharge.

As indicated in section VII of today's proposed rule, it was reported that of the 90 PAI manufacturers, 32 facilities are direct dischargers, 36 indirect dischargers (1 facility is both a direct and indirect discharger), 15 dispose of wastewater by on-site or off-site deep well injection or incineration, and 8 generated no process wastewater by recycle-reuse or no water use. Of the 32 direct dischargers, 31 operate wastewater treatment systems and treat 1.16 billion gallons of wastewater. Of the 36 indirect dischargers, 20 operate wastewater treatment systems and pretreat 98.4 million gallons of wastewater.

#### *IX. Best Practicable Control Technology Currently Available*

##### *A. Need for Revisions to the Applicability of the BPT Limitations in Subcategory A*

EPA is today proposing to amend the BPT applicability provision for Subcategory A to include 15 previously excluded organic PAIs and the organotin pesticides. The COD, BOD, TSS, and pH limitations under BPT for the organic pesticide chemicals manufacturing subcategory will apply to the manufacturing of these 15 PAIs and organotin pesticides. EPA is not proposing to make the BPT total pesticide limitations guideline for the organic pesticide chemicals manufacturing subcategory (which applies to the combined discharge of 49 specified PAIs) applicable to these PAIs, because new BAT limitations are being proposed today that will apply to each of them individually.

When the BPT effluent limitations guidelines were promulgated in 1978 for subcategory A, discharges of conventional pollutants, total pesticide pollutants, and COD, resulting from the manufacture of 25 PAIs and classes of PAIs, were excluded from coverage. These PAIs were excluded because of lack of treatment data. Since then, the Agency has collected effluent data on 15 organic PAIs within the group of 25 PAIs and classes of PAIs. These data were originally collected by the manufacturing facilities themselves in order to monitor their discharges. The organic PAIs for which EPA has collected these data are: Ametryn, prometon, prometryn, terbutryn, cyanazine, atrazine, propazine, simazine, terbufthylazine, glyphosate, phenylphenol, hexazinone, sodium

phenylphenate, biphenyl, and methoprene. EPA has also developed analytical methods and collected effluent data for organotin pesticides, which were not covered in the BPT guidelines. The data available to the Agency demonstrate that all direct dischargers manufacturing any of these PAIs are meeting NPDES permit limitations equivalent to the current BPT guidelines. Therefore, EPA believes that all of these PAIs should be covered by BPT.

The effect of this proposed amendment is to set the BPT limitations at the performance level currently being achieved at facilities under their NPDES permits and to establish a baseline on which to evaluate incremental costs of candidate BCT technologies. Because the facilities are in compliance with NPDES permits that are already based on these BPT limitations, EPA projects that there will be no costs incurred by any of these facilities in connection with today's proposed rule.

EPA emphasizes that it is not reopening the existing BPT regulations or the basis for those regulations for public comment. EPA is soliciting comment only on today's proposal to make the existing BPT limitations applicable to the 15 previously excluded organic contaminants and the organotin pesticides.

#### *X. Best Conventional Pollutant Control Technology*

##### *A. July 9, 1986 BCT Methodology*

The BCT methodology, promulgated in 1986 (51 FR 24974), discusses the Agency's consideration of costs in establishing BCT effluent limitations guidelines. EPA evaluates the reasonableness of BCT candidate technologies (those that are technologically feasible) by applying a two-part cost test:

- (1) The POTW test; and
- (2) The industry cost-effectiveness test.

In the POTW test, EPA calculates the cost per pound of conventional pollutant removed by industrial dischargers in upgrading from BPT to a BCT candidate technology and then compares this cost to the cost per pound of conventional pollutant removed in upgrading POTWs from secondary treatment to advanced secondary treatment. The upgrade cost to industry must be less than the POTW benchmark of \$0.25 per pound (in 1976 dollars, or \$0.47 per pound in 1986 dollars).

In the industry cost-effectiveness test, the ratio of the incremental BPT to BCT cost divided by the BPT cost for the



industry must be less than 1.29, i.e., the cost increase must be less than 29 percent.

#### B. BCT Options Identified

For today's proposed rule, EPA considered whether or not to establish BCT effluent limitation guidelines for Subcategory A plants that would attain incremental levels of effluent reduction beyond BPT for TSS and BOD. The primary technology option identified to attain further TSS and BOD reduction is the addition of multi-media filtration to existing BPT systems.

EPA applied the BCT cost test to use of multi-media filtration technology as a means to reduce BOD and TSS loadings. The plants in Subcategory A were split into two flow categories; high flow (greater than 0.5 million gallons/day [MGD] discharge) (one plant only), and low flow (less than 0.5 MGD), because the unit cost of treatment would be lower at the high-flow plant due to economies of scale. For each of these two flow categories, the Agency evaluated the costs of 48% BOD and 53% TSS removal levels, levels that have been demonstrated in the industry. The cost per pound of the high flow case was \$0.44/lb of BOD and TSS combined, while the cost per pound removed of the low flow case was \$1.96/lb of BOD and TSS combined. Both of these options exceed the \$0.27/lb POTW cost test value. Because these costs exceed the POTW benchmark, the first part of the cost test fails; therefore, the second part of the test was unnecessary. It was therefore determined that multi-media filtration does not pass the cost test for BCT regulations development. In light of the above, BCT limitations for Subcategory A are proposed to be set equal to BPT limitations.

EPA considered but rejected the following other candidate BCT technologies: Carbon adsorption, incineration, evaporation, membrane filtration, additional biological oxidation (above the level required to meet BPT), and the use of settling ponds. Multi-media filtration of the wastewater is required prior to carbon adsorption and membrane filtration and therefore the cost of multi-media filtration plus carbon adsorption or membrane filtration would be more than the cost of filtration alone. In addition, while these two technologies can be effective in removing specific compounds from wastewater, they may not be particularly effective in removing those materials exerting biological oxygen demand. Incineration and evaporation were projected to have much higher costs than multi-media filtration due to the need to purchase fuel and therefore

were both excluded from further consideration. Biological oxidation and clarification were used as the basis for BPT, and there are no data to demonstrate that higher effluent quality could be achieved for PAI manufacturing wastewaters by increasing biological residence time, increasing mixed liquor suspended solids, or through the addition of settling ponds, and so these options were rejected. Finally, the Agency looked at the use of polymers and coagulants to enhance clarification. While some facilities use these chemical agents on specific pesticide-containing wastewaters to enhance the treatment system performance, there was no data available to demonstrate additional removals of the conventional pollutants. Therefore, this option was rejected for lack of data.

For Subcategory B, the Agency is reserving BCT because BPT limitations already require zero discharge of process wastewater pollutants. This is the most stringent limitation possible; there is no need for BCT regulations reflecting more stringent control technologies.

#### XI. Best Available Technology Economically Achievable

##### A. Need for BAT Regulation

The pesticide chemicals industry manufactures large volumes of PAIs, and the use of contact process water, as well as the collection of spills, leaks, and rainwater results in significant discharges of organic PAIs and priority pollutants from this industry. The EPA estimates that approximately 200,000 pounds of PAI's and 17,000 pounds of priority pollutants per year are discharged directly to surface waters by Subcategory A plants after achieving BPT. In addition, it is estimated that 5.8 million pounds per year of volatile organic priority pollutants are present in PAI wastewaters with considerable potential for volatilization to the atmosphere. BPT for Subcategory B requires no discharge of process wastewater pollutants.

BPT limitations set in 1978 for Subcategory A control the discharge of: (1) Total PAIs for 49 organic PAIs and (2) COD, BOD, TSS, and pH when their presence in wastewaters results from the manufacture of any PAIs (except the 25 specifically exempted). Due to the large number of PAIs currently being discharged with only minimal treatment, and the lack of limitations on priority pollutants, EPA has concluded that BAT effluent limitations for PAIs and priority pollutants are necessary. The Agency is proposing that 122 individual PAIs be

regulated under BAT in the organic pesticide manufacturing subcategory. The Agency is also proposing that 28 priority pollutants be regulated under BAT for the organic pesticide manufacturing subcategory.

The discharge limits specified under today's proposed BAT effluent limitations guidelines differ from BPT limits promulgated in 1978 for the organic pesticide chemicals manufacturing subcategory. As mentioned earlier, the existing BPT regulation limits total pesticides, that is, the total mass of all 49 PAIs in wastewaters resulting from the manufacture of the 49 organic PAIs, the proposed BAT effluent limitations will regulate 122 individual PAIs, including 107 PAIs. That were left unregulated by the 1978 BPT effluent limitations. Fifteen of the 122 are part of the 49 already regulated as total pesticides.

EPA is proposing to reserve BAT for Subcategory B because the BPT regulations already require no discharge of process wastewater pollutants.

##### B. BAT Technology Options and Selection

The factors considered in establishing the best available technology economically achievable (BAT) level of control include: The age of process equipment and facilities, the processes employed, process changes, the engineering aspects of applying various types of control techniques, the costs of applying the control technology, non-water quality environmental impacts such as energy requirements, air pollution and solid waste generation, and such other factors as the Administrator deems appropriate (section 304(b)(2)(B) of the Act). In general, the BAT technology level represents the best existing economically achievable performance among plants with shared characteristics. Where existing wastewater treatment performance is uniformly inadequate, BAT technology may be transferred from a different subcategory or industrial category. BAT may also include process changes or internal plant controls which are not common industry practice.

The BAT limits established must be economically achievable. In making this determination, the Agency takes into consideration factors such as plant closures, product line closures, and total cost effectiveness (dollar per pound-equivalent removal). Although costs are considered in this manner, the primary determinant of BAT is the effluent reduction capability of the control technology.



The Agency is today proposing BAT effluent limitations under subcategory A for 91 PAIs and classes of PAIs (a total of 122 individual PAIs), and for 28 priority pollutants. Included under the organic pesticides manufacturing subcategory are the organo-tin active ingredients. Under subcategory B, the Agency is proposing to reserve establishing BAT effluent limitations.

EPA identified two regulatory options for consideration to reduce the discharge of priority pollutants and PAIs by organic pesticide manufacturers. Those proposed BAT limitations for PAIs are presented in appendix A of the regulation; the proposed BAT limitations for priority pollutants are presented in appendix B of the regulation. For a more detailed discussion of the basis for the limitations and technologies selected, see section 10 of the Technical Development Document.

The two technology options considered for Subcategory A BAT are:

1. *Option 1: Treated Discharge.* Under Option 1, BAT limitations for the subcategory A would be based on the use of hydrolysis, activated carbon, chemical oxidation, resin adsorption, solvent extraction, and/or incineration, to control the discharge of PAIs in wastewater. The proposed limitations are to be based, wherever possible, on actual industry monitoring data on the performance of these treatment technologies as applied to the PAI in question. Where actual full scale data are not available, the proposed BAT limitations are based on a transfer of treatment system performance data from similar PAIs and BAT treatment systems, supported by data from EPA or industry bench-scale treatability studies. In some cases, BAT limitations would require that existing PAI treatment technologies currently in place at facilities be improved by enhanced operations, such as hydrolysis with increased retention time, carbon adsorption with increased retention time, and additional PAI monitoring. Also, a zero discharge requirement is proposed under Option 1 for certain PAIs where zero discharge has been demonstrated to be achievable through water reuse or the lack of water use. In addition, Option 1 would base BAT effluent limitations for priority pollutants on the use of the model control technologies identified in the OCPSF effluent guidelines rulemaking.

2. *Option 2: Zero Discharge.* Option 2 would require the organic pesticide chemicals manufacturing subcategory to achieve zero discharge for all pesticide manufacturing wastewater pollutants, based on the use of on-site or off-site incineration and/or recycle and reuse.

EPA is proposing Option 1 for BAT effluent limitations guidelines for Subcategory A plants. Option 1 would greatly reduce pollutants discharged into the environment while avoiding cross-media transfer of pollutants and incorporating recycle/reuse technologies where possible. The pollutants that are not recycled or reused under this option would be destroyed by the BAT treatment technologies. This option would have minimal economic impacts (see section XVI of today's notice). The Agency proposes to reject Option 2 because of the cross-media implications of the transfer of pollutants as well as the severe economic impacts that would result from implementing this option (see section XVI of today's notice).

### C. Calculation of BAT

1. *Subcategory A Plants.* The BAT effluent limitations that EPA is proposing today for Subcategory A are based, whenever possible, on treatment system performance data submitted by pesticide chemicals manufacturing facilities with BAT model treatment technologies in place. At each stage of BAT limitations development, the Agency attempted to obtain data from pesticide chemicals manufacturing plants with treatment systems representing BAT performance to provide as complete coverage as possible for the PAIs and priority pollutants discharged by the pesticide chemicals manufacturing industry. Data sources used by the Agency as bases for BAT limitations are discussed in detail in section 3 of the Technical Development Document for today's proposed rule.

Data sources include both in-plant and end-of-pipe sampling locations. Some plants provided only end-of-pipe data. Many other plants manufacture other products besides PAIs. In most cases, these plants treat to remove PAIs and then combine the wastewaters for treatment to remove other pollutants. Where in-plant data demonstrated that very low concentrations of PAIs were achieved prior to combining treated pesticide process wastewaters with other process wastewaters, dilution of the pesticide process wastewater with other wastewaters would make it impossible for the discharger to demonstrate compliance at end-of-pipe. In these cases, EPA is proposing to require in-plant monitoring and limitations (i.e., at a point after treatment to remove PAIs but prior to combining with other wastewaters). The proposed regulation specifies the PAIs for which in-plant monitoring and limitations are required. Because the priority pollutant limitations are

transferred from the OCPSF limitations, which apply at end-of-pipe, the priority pollutant monitoring and limitations for pesticide chemicals manufacturing are applicable to end-of-pipe discharge only.

The BAT database for organic PAIs and calculation of effluent limitations from this database are presented in section 7 of the Technical Development Document for today's proposed rule.

Effluent limitations for priority pollutants are being transferred from the OCPSF category to the pesticide chemicals manufacturing industry; therefore, the BAT database for priority pollutants and calculation of effluent limitations from that database are presented in the OCPSF development document ("Development Document for Effluent Limitations Guidelines and Standards for the Organic Chemicals, Plastics and Synthetic Fibers Point Source Category", EPA 440/1-87/009), available in the public docket for this rulemaking (see also the OCPSF final rule, 52 FR 42523, November 5, 1987). The basis of BAT limitations, for (1) organic PAIs and (2) priority pollutants, is discussed in more detail below. The BAT effluent limitations guidelines being proposed are presented in Tables 2, 4 and 5 of today's proposed rulemaking. BAT limits for organic PAIs are mass limits expressed in terms of production, i.e., maximum PAI discharge pounds are determined by how many pounds per day of the PAI are produced. BAT limits for priority pollutants are concentration based, i.e., all units in appendix B are expressed in micrograms per liter.

EPA is soliciting comments on the approach explained herein for setting priority pollutant limitations only with respect to its appropriateness for the pesticides manufacturers rulemaking. The comment period on any of the issues discussed is not being reopened with respect to the OCPSF rulemaking.

a. *Organic Pesticide Active Ingredients.* The Agency based BAT limitations and costs for organic PAIs on the performance of hydrolysis, activated carbon, chemical oxidation, resin adsorption, and/or incineration treatment systems. Limitations were based on: (1) Where available, actual concentrations of PAIs in wastewaters treated by full-scale BAT treatment systems; or (2) the transfer of limitations and estimated performance data for structurally similar PAIs. Limitations were transferred in only a few cases. In most cases, actual full-scale data were available. Production-based mass limitations were calculated by using the concentration data, the average daily flow, and the average daily production.



The calculation for the daily production-based limitation was performed by: (1) Fitting daily PAI concentration data to a modified delta-lognormal distribution<sup>1</sup>, the same statistical procedure that was used in the OCPSF rulemaking; (2) estimating the 99th percentile of the distribution of daily PAI concentrations from the fitted distribution of daily concentration measurements; (3) multiplying the estimated 99th percentile of the distribution of concentrations by daily average flow; and (4) dividing the result by daily average production to give the daily production-based mass limitation. The monthly average production-based mass limitation was calculated similarly except the 95th percentile of the distribution of monthly averages is used instead of the 99th percentile of daily concentration measurements.

The delta-lognormal distribution models the data as a mixture of non-detects and measured values. This distribution was selected because the data for most PAIs consisted of a mixture of measured values and non-detects. The delta-lognormal distribution assumes that all non-detects have a value equal to a single detection limit and the detected values follow a lognormal distribution. In plant-PAI data sets where all values are measured (i.e., non-detects are not present) the delta-lognormal models the data as the usual lognormal distribution. In most cases, plants provided a single detection limit for non-detects for each PAI which was consistent with the delta-lognormal model. However, data for seven plant-PAI combinations (for six plants) included more than one detection limit. In these cases, EPA selected the most commonly reported plant-PAI detection limit for the analysis. As discussed in the Technical Development Document, EPA also calculated limitations by assigning the other reported detection limits to the non-detect values and found that they resulted in limitations that were not substantially different.

The variability factors were calculated by fitting the concentration data to the delta-lognormal distribution. The daily variability factor is a statistical entity defined as the ratio of the estimated 99th percentile of the distribution of daily values divided by the expected value, or mean, of the distribution. Similarly, the monthly variability factor is defined as the estimated 95th percentile of the distribution of four-day averages

divided by the expected value of the monthly average.

For 20 PAIs without actual performance data from a BAT treatment system, limitations were transferred from those derived for PAIs having similar chemical structures and BAT treatment performance. The limitations were generated by: (1) Setting achievable concentrations for each chemical structural group and BAT technology performance as described above; (2) applying variability factors for each structural group and for the associated BAT treatment technology as described above; and (3) determining the production-based mass limitations for each plant-PAI combination by multiplying the long-term average flow by the concentration-based limitation value and dividing this quantity by the average daily production. EPA solicits comment on alternative methods for the calculation of limitations where actual performance data are not available.

b. Priority Pollutants. EPA is proposing effluent limitations and pretreatment standards for 28 priority pollutants. For 23 of these 28 priority pollutants, EPA is relying on the OCPSF database to set limits that are identical to the limits set for these pollutants in the OCPSF guidelines. For four other priority pollutants which were not regulated under OCPSF and for which there are no treatment performance data, EPA is using limitations set in the OCPSF guidelines for other priority pollutants that are deemed to have similar "strippabilities." This is the same procedure used in the OCPSF rulemaking for developing limitations when performance data was lacking for certain priority pollutants. Limitations for one priority pollutant, cyanide, were proposed based on actual long-term full-scale data from the pesticide industry.

For 23 priority pollutants, the Agency proposes to transfer BAT limitations from the OCPSF category. As discussed in section VI of today's proposed rule, 55 of the 90 pesticide chemicals manufacturing facilities also manufacture compounds regulated under the OCPSF category. Typically, wastewaters from pesticide manufacture are ultimately commingled with OCPSF wastewaters generated at the site and treated in the same end-of-pipe (EOP) wastewater treatment systems. Even though pesticide wastewaters may be pre-treated to remove PAIs, their priority pollutants are removed in the same EOP treatment system that removes priority pollutants from OCPSF wastewaters.

In the OCPSF rulemaking, EPA identified treatment technologies that

have been shown to be effective and the best available for removing priority pollutants from commingled OCPSF and pesticide manufacturing wastewaters. EPA has determined that 23 priority pollutants regulated in the OCPSF guidelines also may be found in wastewaters from pesticides manufacturing. EPA therefore proposes that the limitations for these 23 pollutants (22 volatile and semi-volatile organic priority pollutants and one metallic priority pollutant) be directly transferred to the pesticide chemicals manufacturing category as BAT effluent limitations guidelines. The bases for the OCPSF BAT limitations for priority pollutants are discussed below. An additional discussion is given in the OCPSF Development Document.

c. Volatile and Semi-Volatile Organic Pollutants. In the OCPSF rulemaking, EPA based its BAT limitations and costs for volatile organic priority pollutants on in-plant steam stripping alone for plants without end-of-pipe biological treatment. For the volatiles limited in the end-of-pipe biological treatment subcategory, the combination of steam stripping and end-of-pipe biological treatment were used for limitations and costing. The data used to derive these limits for the end-of-pipe biological treatment subcategory were taken from plants which exhibited good volatile pollutant reduction across the entire wastewater treatment system. To establish limits for the non-end-of-pipe biological treatment subcategory, EPA used steam stripping data for volatile organic pollutants collected from plants that either did not have end-of-pipe biological treatment or provided data on the separate performance of the in-plant steam stripping treatment technology.

Steam stripping employs super-heated steam to remove volatile pollutants of varying solubility in wastewater. Specifically, the technology involves passing super-heated steam through a preheated wastewater stream column packed with heat resistant packing materials or metal trays in counter-current fashion. Stripping of the organic volatiles constituents of the wastewater stream occurs because the organic volatiles tend to vaporize into the steam until their concentrations in the vapor and liquid phases (within the stripper) are in equilibrium.

Steam strippers are designed to remove individual volatile pollutants based on a ratio (Henry's Law Constant) of their aqueous solubility (tendency to stay in solution) to vapor pressure (tendency to volatilize). The column height, amount of packing or number of trays, the operating steam pressure and

<sup>1</sup> A description of the delta-lognormal distribution is available in the Technical Development Document.



temperature of the heated feed (wastewater) are varied according to the strippability (using Henry's Law Constant) of the volatile pollutants to be stripped. Volatiles with lower Henry's Law Constants require greater column height, more trays or packing material, greater steam pressure and temperature, more frequent cleaning and generally more careful operation than do volatiles with higher strippability. (See the final OCPSF rule, 52 FR 42540, for a further description of steam stripping technology).

The final OCPSF data consisted of performance results from 7 steam strippers at 5 plants for 15 volatile organic pollutants. The data were edited to ensure only data representing BAT-level design and operation were used to develop limitations.

The Agency also identified two other treatment technologies as the technology basis for the removal of certain semi-volatile organic pollutants under the OCPSF regulations. These two technologies are activated carbon adsorption and in-plant biological treatment. EPA also relied on the ability of end-of-pipe biological treatment to achieve some additional pollutant removal beyond carbon adsorption and in-plant biological treatment. See 52 FR 42543-44 for a discussion of these technologies and a description of the data that EPA relied on for setting the OCPSF limitations on these semi-volatile organic pollutants. Two of the pollutants—phenol and 2,4-dimethylphenol—are among the 22 OCPSF organic priority pollutants that also occur in pesticides manufacturers' wastewaters and for which EPA is proposing today to set limitations that are transferred from the OCPSF rule.

For some of the OCPSF volatile and semi-volatile pollutants (including some of the ones for which limitations are also being proposed in today's notice for pesticides manufacturers), the available effluent data consisted of measurements so low that very few exceeded the analytical threshold level (10 ppb, the minimum level for most pollutants—see section X, comment 7 of the OCPSF final rule, 52 FR 42562, November 5, 1987). Since variability factors could not be calculated directly for these pollutants, in the OCPSF rule, EPA transferred variability factors from related pollutants (see 52 FR 42541). EPA determined that the data from these plants provided an adequate basis to set limitations for the OCPSF industry.

EPA finds that it is appropriate to transfer the limitations established for volatile and semi-volatile organic pollutants in the OCPSF industry to this rulemaking to set limitations on the

same pollutants in the wastestreams of pesticides manufacturers. The technologies identified (steam stripping technology, in-plant biological treatment, and activated carbon adsorption, combined in some cases with end-of-pipe biological treatment) are available at pesticides manufacturing plants (these technologies are all already in use at certain pesticides manufacturing plants or combined OCPSF/pesticides manufacturing plants). In addition, these technologies will be capable of removing from pesticides manufacturers' wastewaters the amounts of volatile and semi-volatile pollutants necessary to meet the transferred limitations. Specifically, EPA finds that applying these technologies to pesticides manufacturers' wastewaters will result in treatability levels for volatile and semi-volatile organic pollutants that are similar to the treatability levels of these same pollutants in OCPSF wastewaters. EPA stated in the OCPSF rule that although the degree to which a compound is stripped can depend to some extent upon the wastewater matrix, the basis for the design and operation of steam strippers is such that matrix differences were taken into account for the compounds the Agency evaluated. A sort of the strippability data confirmed that process wastewater matrices in the OCPSF industry generally do not preclude compliance with the concentration levels established in the OCPSF rulemaking (52 FR 42540-41). The wastewater matrices in the pesticides manufacturers industry are generally similar to those in the OCPSF industry, and so they generally would not preclude compliance with the concentration levels being proposed for volatile pollutants.

d. Lead. The OCPSF rule set a concentration-based limitation on lead, to be applied only to the flows discharged from metals-bearing process wastewaters (see 52 FR 42542). Compliance could be monitored in-plant or, after accounting for dilution by nonmetal-bearing process wastewater and non-process wastewaters, at the outfall. The OCPSF rule stated that the permit writer may on a case-by-case basis provide additional discharge allowances for metals in non-OCPSF process or other wastewaters where they are present at significant levels. When BAT limits have not been established, these allowances must be based upon the permit writer's best professional judgment of BAT.

The concentration limits were based on the use of hydroxide precipitation technology, which is the standard

metals technology that forms the basis for virtually all of EPA's BAT metals limitations for metal-bearing wastewaters. Because very little OCPSF data on the effectiveness of hydroxide precipitation technology were available, EPA decided to transfer data for this technology from the Metal Finishing Industry.

EPA finds that it is appropriate to transfer the limitations established for lead in the OCPSF industry to this rulemaking to set limitations on lead in the wastestreams of pesticides manufacturers. The technology identified, hydroxide precipitation, is available at pesticides manufacturing plants. In addition, this technology will be capable of removing from pesticides manufacturers' wastewaters the amounts of lead necessary to meet the transferred limitations. Specifically, EPA finds that applying this technology to pesticides manufacturers' wastewaters will result in a treatability level for lead that is similar to the treatability level of lead in OCPSF wastewaters. The concentrations of lead in pesticides manufacturers' wastewaters are generally in the range found at OCPSF plants. As discussed in the OCPSF rule, this transfer of technology and limitations from the Metal Finishing Industry Category to the OCPSF rule, and now to the pesticides manufacturers rule, is further supported by the principle of precipitation. Given sufficient retention time and the proper pH (which is achieved by the addition of hydroxide, frequently in the form of lime), and barring the binding up of metals in strong organic complexes (which are not present in pesticides manufacturers' wastewaters), a metal exceeding its solubility level in water can be removed to a particular level—that is, the effluent can be treated to a level approaching its solubility level for each constituent metal. This is a physical/chemical phenomenon that is relatively independent of the type of wastewater (barring the presence of strong complexing agents) (see discussion at 52 FR 42543).

e. Reliance On End-Of-Pipe Biological Treatment. As explained above, today's proposal does not derive limits independently for 23 priority pollutants but expressly relies on the OCPSF rulemaking and accompanying record for setting these limits. In the litigation over the OCPSF rule, an issue arose over EPA's methodology for setting these priority pollutant limits. Specifically, the issue concerned EPA's decision to establish one set of priority pollutant limits for direct discharger plants that do not use end-of-pipe



biological treatment and a different set of limits for those direct dischargers that do.

Some, but not all, OCPSF plants use end-of-pipe biological treatment to meet their limitations on conventional pollutants. These plants rely on other technologies to reduce their priority (toxic) pollutants; however, the biological treatment has the incidental effect of removing some further amount of the priority pollutants. The OCPSF rule, therefore, accounts for this further removal of toxics by the end-of-pipe biotreatment systems by establishing one set of priority pollutant limitations for those facilities that do not use end-of-pipe biotreatment (the OCPSF "Subcategory J" limitations) and a different, generally more stringent set of limitations for those plants that do (the OCPSF "Subcategory I" limitations).

In the OCPSF litigation, NRDC claimed that EPA had not sufficiently aired this methodology for comment. Also, on the merits, NRDC claimed that EPA's approach is improper because it allows facilities to meet fewer and less stringent limits on the priority pollutants by choosing not to use end-of-pipe biological treatment to treat their conventionals. The court remanded this issue to EPA for further notice-and-comment proceedings, and the Agency is in the midst of a new rulemaking to resolve this issue for the OCPSF rule.

On remand, EPA reconsidered this methodology and issued a re-proposal in December, 1991 that adopts the same approach that was originally promulgated (56 FR 63897). The re-proposal discusses NRDC's claims and explains in detail why EPA still believes the original approach is appropriate. To summarize that discussion, the Agency recognized that certain OCPSF facilities, such as chlorosolvent plants, have BOD5 levels that are too low to allow for effective biological wastewater treatment and do not require end-of-pipe biological treatment to meet their BPT limitations. A biological system cannot operate effectively without a sufficient mass of organic biodegradable material to sustain the microorganisms that consume the biodegradable waste. EPA concluded that these plants should not have their BAT effluent limitations based on the performance of in-plant controls and end-of-pipe biological treatment. Therefore, the OCPSF subpart J effluent limitations were based solely on the performance of in-plant controls such as steam stripping.

NRDC urged the EPA to establish a raw waste "floor" level below which biological end-of-pipe treatment is not appropriate or to limit the applicability of subpart J to those categories of

OCPSF production that tend to have low raw waste levels. This suggestion appeared logical in theory but EPA concluded that it was not feasible in practice. The Agency explained that, due to the wide variety and complexity of raw materials and processes used and of products manufactured in the OCPSF industry, it would be nearly impossible to analyze each plant's wastestream to determine a technically defensible BOD5 floor, or series of floors for different plants with different operating and wastewater characteristics, especially when the literature does not provide a theoretical basis for a BOD5 cutoff.

EPA also determined that the BOD5 floor suggested by NRDC was not necessary. Common sense and economic considerations dictate that OCPSF plants will not opt to forego end-of-pipe biological treatment in order to qualify for the subpart J BAT limitations. Moreover, the Agency found that subpart J will not result in significantly greater environmental loadings than subpart I.

In addition, EPA found that NRDC's suggestions could result in undesirable treatment decisions. The Agency's OCPSF regulatory scheme gives the regulated community some degree of management discretion in selecting appropriate combinations of source controls or pollution prevention techniques as well as appropriate in-plant or end-of-pipe wastewater management and treatment techniques. The Agency is concerned that the attempt to establish a BOD5 floor would result in plants making undesirable treatment decisions that the Agency did not intend; for example, a plant that has already installed or is considering installing in-plant product and by-product recovery may feel compelled to reduce the effectiveness of in-plant control to ensure that sufficient organic matter is available to be able to operate an end-of-pipe biological treatment system, or to operate such a system in a cost-effective fashion.

Today's proposed rule, by using limitations for priority pollutants that are directly transferred from the OCPSF rulemaking, follows the OCPSF approach of setting two sets of limits, one for plants that use end-of-pipe biological treatment and one for plants that do not. As with the OCPSF industry, some pesticides manufacturers fall into each category. EPA is proposing this approach in order to be consistent with what was promulgated (and now re-proposed) for OCPSF. Moreover, consistency with the OCPSF regulations is necessary in some cases to avoid having two different sets of limits

applicable to the same pollutant being discharged by a single combined OCPSF/pesticides plant. EPA expects that any change it may adopt in this approach when the December, 1991 OCPSF re-proposal is made final will also be reflected in the final pesticides manufacturing rule.

EPA notes that there are two priority pollutants (2-chlorophenol and 2,4-dichlorophenol) for which limitations are proposed for plants that use end-of-pipe biological treatment but for which limitations are not proposed for plants that do not use end-of-pipe biological treatment. This reflects the approach used in the OCPSF rulemaking. In the OCPSF rule, limitations for these two priority pollutants were not proposed for plants without end-of-pipe biological treatment because of a lack of treatability data and because a transfer of limitations was not possible (see the OCPSF Development Document, section 7).

In today's proposal, even for those plants that use end-of-pipe biological treatment, the costs of that treatment were not counted as part of the costs of meeting BAT. This is because end-of-pipe biological treatment is already being applied by these plants to meet their existing BPT limits.

In considering NRDC's suggestions, EPA concluded in the December, 1991 OCPSF re-proposal that the OCPSF point source category was too complex for the Agency to approach perfect plant-specific knowledge of the industry. The Agency noted, however, that in a smaller, less complex industry it might be possible to assess more completely the intricacies of each plant's or each plant category's treatment system. The pesticides manufacturing industry does contain a fewer number of plants than the OCPSF industry, but the types of products and processes are nevertheless varied and complex. EPA therefore finds that, as with the OCPSF rulemaking, plant-specific knowledge of pesticides manufacturing plants is similarly infeasible and it is thus appropriate to follow the OCPSF rulemaking approach in today's proposal. The Agency solicits comments, however, on whether it is appropriate in this rulemaking to follow the OCPSF rulemaking approach on accounting for the use of end-of-pipe biological treatment.

f. Remanded OCPSF Priority Pollutant Limitations. The OCPSF rule established subpart J direct discharge toxic pollutant limitations for plants that were projected to comply with BPT limitations without the use of end-of-pipe biological treatment or off-site disposal. The numeric limitations were



based on the performance of in-plant wastewater treatment technology including steam stripping to remove volatile priority pollutants, chemical precipitation for metals, and in-plant biological treatment for removal of selected priority pollutants including phenol and 2,4-dimethylphenol. Industry challenged the limitations based on in-plant biological treatment arguing, in part, that the plants used by EPA to derive the limitations based on in-plant biological treatment had more treatment in place than EPA's model treatment used to estimate costs of compliance, and that EPA therefore significantly underestimated the costs of installing in-plant biological treatment. The court remanded this issue to EPA. Specifically, 19 of the 20 subpart J pollutants based on in-plant biological treatment were remanded; this group includes three of the priority pollutants included in today's proposal for pesticides manufacturers: 2,4-Dimethylphenol, Naphthalene, and Phenol.

In the December, 1991 notice, EPA re-proposed the same numerical limitations it had originally promulgated, with revised costs of compliance (56 FR 63902-05). The revised compliance costs are based on revised model in-plant biological treatment systems with increased residence times as a function of reported or projected raw waste toxic pollutant concentrations. EPA expects that any change it may adopt in this approach and in the actual numeric limitations when the December, 1991 OCPSF re-proposal is made final will also be reflected in the final pesticides manufacturing rule.

g. Four Brominated Pollutants and Cyanide. Four priority pollutants (Bromomethane, Tribromomethane, Bromodichloromethane, and Dibromochloromethane), detected at significant concentrations in pesticide manufacturing wastewaters, were not regulated for BAT under the OCPSF category. EPA is proposing to set BAT effluent limitations for those four pollutants by transferring OCPSF limitations for compounds that have similar strippabilities (see discussion in section IV.A.5 above).

The proposed limitations for total cyanide are not transferred from OCPSF but instead are based on the median values of the effluent data from treatment systems incorporating chemical oxidation and biological treatment at two pesticide manufacturing facilities and five organic chemicals manufacturing facilities, along with effluent data from one

pesticides manufacturing facility with biological treatment only.

h. Use Of Steam Stripping As The Basis For Limitations. In the OCPSF rule and in today's proposal, EPA has based the effluent limitations for volatile organic pollutants on the use of steam stripping with product recovery or destruction rather than on air stripping, which would allow air emissions of pollutants.

In the absence of any wastewater treatment, pesticides manufacturing plants would discharge wastewaters containing volatile and semi-volatile organic pollutants into the receiving waters or into POTWs, without removal of these pollutants. These pollutants would be contained initially in the receiving waters or the POTWs, but a significant percentage of them would ultimately volatilize from the receiving waters or POTWs into the atmosphere. Because many direct discharging pesticides manufacturers already have wastewater treatment facilities, most of these volatile pollutants are not discharged and volatilized downstream, but rather are taken out of the wastewater prior to discharge through biodegradation, recovery, accumulation in sludge, or volatilization. While the volatilization from existing wastewater treatment systems may tend to concentrate residual volatile pollutants near the plant, it would be offset by the combined effect of the BPT and BAT regulations. Efforts to comply with the proposed BAT regulations are expected to enhance the performance of the existing wastewater treatment facilities. It appears likely that they will generally cause a net decrease in air emissions. In many cases they will result in the increased use of technologies such as steam stripping that will lessen air emissions. At worst, they will fail to address an existing air pollution problem.

In the OCPSF rule, the Agency discussed at length whether it could require the use of steam stripping over air stripping in order to prevent air emissions. After considering the broad variety of technical, policy, and legal issues involved, the Agency concluded that the issue of volatile air emissions from OCPSF facilities is best addressed under laws that specifically direct EPA to control air emissions (56 FR 42558-62). The primary statutes providing such directions are the Clean Air Act (42 U.S.C. 7401 et seq., as amended by the Clean Air Act Amendments of 1990, Pub. L. 101-549, Nov. 15, 1990) and, in the case of facilities managing hazardous waste, the Resource Conservation and

Recovery Act (RCRA) (42 U.S.C. 6901 et seq.).

The Clean Air Act was significantly amended in 1990. Pursuant to these amendments, EPA plans to issue certain guidelines and standards addressing air emissions associated with industrial wastewaters (specifically, EPA expects to issue a Control Techniques Guideline for Industrial Wastewater and a National Emissions Standard for Hazardous Air Pollutants, as described in section XVIII below).

Given these existing or developing controls over air emissions associated with industrial wastewaters, it may not be necessary to pursue any further the subject of mandating the use of steam stripping rather than air stripping under the Clean Water Act. On the other hand, since the OCPSF rule was promulgated in 1987, the Agency has placed additional emphasis on pollution prevention. In light of this new emphasis, and because the coverage of the upcoming CAA restrictions on industrial wastewater emissions is not yet clear, the Agency solicits comments on whether a different approach can or should be taken for pesticides manufacturers.

2. Subcategory B Plants—Under subcategory B, the Agency is proposing to reserve establishing BAT effluent limitations. The BPT effluent limitations for Subcategory B already require no discharge of process wastewater pollutants. This is the most stringent limitation possible; there is no need for BAT regulations reflecting more stringent control technologies.

#### D. Applicability of BAT Limitations

The Agency is proposing that each discharger in Subcategory A be subject to the effluent limitations for the pollutants regulated in that subcategory. Once a pollutant is regulated, the regulation will serve as the basis for limitations in the National Pollutant Discharge Elimination System (NPDES) permits issued to direct dischargers [see 40 CFR 122.44(a)]. The monitoring requirements for plants in Subcategory A will include an analysis for all priority pollutants regulated and only for those PAIs used or manufactured at each plant.

#### E. BAT Pollutant Removals, Costs, and Economic Impacts

EPA estimates that the proposed BAT regulation will result in the incremental removal (beyond that achieved by BPT) of 160,000 pounds per year of PAIs and 14,000 pounds per year of priority pollutants. In addition, steam strippers to remove volatile pollutants would



reduce air emissions by nearly six million pounds per year. Much of the volatile pollutants are currently being emitted to the air from sewers and biological treatment systems. Achievement of BAT is estimated to require capital costs of \$14.9 million and annualized costs of \$14.7 million (1986 dollars). There are no plant closures anticipated as a result of the BAT regulation. Two facilities are projected to close product lines as a result of the regulation, with job losses equivalent to 31 full-time employees. A discussion of the economic impact analysis of BAT is contained in section XVI of today's notice.

## *XII. New Source Performance Standards*

### *A. Need for NSPS Regulation*

New Source Performance Standards (NSPS) represent the most stringent numerical values attainable through the application of the best available demonstrated treatment technologies for nonconventional, conventional, and priority pollutants. The reasonableness of costs to implement the best treatment technologies for new plants are considered.

For Subcategory A, the Agency has determined that limitations that are more stringent than BAT limitations required for existing plants can be achieved and are justified in some cases; in the remaining cases, NSPS is proposed to be set equal to BAT.

The Agency is proposing to reserve NSPS for Subcategory B, because BPT already requires no discharge of process wastewater pollutants. This is the most stringent limitation possible; there is no need for BAT regulations reflecting more stringent control technologies. In addition, EPA believes it is unlikely that there will be any new manufacturers of the metallo-organic pesticides currently being manufactured. New manufacturing plants, to the extent there are any, would very likely produce only new pesticides not registered in 1986. Unlike organic pesticide chemicals, where new producers of currently manufactured pesticides are possible, we believe new producers are unlikely, because there have been no new plants in the metallo-organic pesticide industry for more than 20 years and because the current PAIs produced are the same as those produced over the past 20 years (i.e., there have been no new metallo-organic PAIs in 20 years). Therefore, the Agency does not believe there will be any new sources, and there is no need for NSPS.

### *B. NSPS Technology Options and Selection*

The Agency considered the following two options to regulate NSPS for conventional, nonconventional and priority pollutants.

**1. Option 1: Treated Discharge—**Option 1 would base NSPS limits on the BAT limitations for organic PAIs in Subcategory A, except that the limits would be modified to reflect the capability for wastewater flow reduction at new facilities. The Agency compared wastewater generation and discharge practices at more recently built pesticides manufacturing plants with those at older plants. Specifically, EPA looked at these practices for PAIs for which BAT regulations are being proposed today, most of which are produced at the older plants. The Agency compared these practices to those used for similar production processes at the more modern plants (i.e., the comparison involved a similar production process at the newer plant but not necessarily production of the same PAI; in many cases, the comparison was to the production of a PAI that is not covered by today's proposed regulations). The Agency found that an average wastewater volume flow reduction of 28 percent has been demonstrated at the newer facilities for similar production processes. Therefore, to set proposed NSPS limitations, EPA used the BAT limitations and applied a 28 percent wastewater flow reduction to arrive at the mass-based proposed NSPS limits.

This flow reduction was applied to all PAIs for which proposed BAT limits are based on the flows at older facilities (of course, where the proposed BAT is a zero discharge limit, the proposed NSPS is also set at zero discharge). There are two PAIs being proposed for regulation (with non-zero limitations) that are being produced at the more modern plants. Data from these newer plants shows that they have both achieved flow reductions of at least 28 percent compared to older plants. Therefore, because there is no information demonstrating that further flow reductions are possible, EPA is setting the proposed NSPS limits for these two PAIs equal to the proposed BAT limits.

NSPS Option 1 limitations for BOD, COD, and TSS for Subcategory A would also be set equal to BPT limitations but would reflect a reduction in wastewater flow of 28 percent (except for two PAIs, as discussed above). NSPS limitations under Option 1 for priority pollutants discharged by Subcategory A plants would be set equal to BAT because these limits are concentration-based.

The capability of reduced wastewater flow at new plants would be taken into account by the permit writer to arrive at mass-based permit limits.

**2. Option 2: Zero Discharge—**Option 2 would require zero discharge of process wastewater pollutants, based on off-site or on-site incineration and recycle/reuse. NSPS Option 2 corresponds to BAT Option 2. The costs and associated economic impacts of NSPS Option 2 are considered to be essentially the same as those for BAT Option 2 since the costs of on-site or off-site incineration (and associated transportation costs) and recycle/reuse would be the same at new and existing plants. NSPS Option 2, like BAT Option 2, therefore would be extremely expensive (see section XVI D.2.). The Agency proposes to reject Option 2, because the economic impact of this option would be too severe.

As a third option, the Agency also considered membrane filtration technology added to Option 1 for further pollutant reduction. However, the removal levels that this technology can achieve have not been demonstrated at any pesticide chemicals manufacturing plant. Therefore, the Agency did not base NSPS on this technology.

The Agency also considered the option of basing NSPS on the BAT technology with no additional flow reduction in any case. However, the Agency believes that flow reduction has been demonstrated in many cases as described, and, because flow reduction may mitigate the costs for treatment, and in some cases, also decrease production costs, new plants have an incentive to include flow reduction as an integral part of the plant design. Therefore, the proposed NSPS includes flow reduction as described.

EPA is proposing Option 1 for NSPS effluent limitations guidelines. Option 1 provides for reduction of pollutants discharged into the environment beyond that which is achieved by BAT. In addition, enhanced cross-media pollution control would be realized, due to the reduction in wastewater flow prior to treatment.

An additional factor to consider with new sources is the production of only new PAIs. The pesticide chemicals manufacturing category is unique in that expansion or changes in the industry are not likely to occur through the manufacture of currently produced PAIs at new facilities. Instead, it is more likely that only new PAIs would be manufactured at new facilities. Since the nature of the treatability of new PAIs cannot be readily predicted, the Agency does not believe it is possible to develop



NSPS guidelines for treatment of new PAIs.

### C. Applicability of NSPS

The Agency is proposing NSPS under Subcategory A for the conventional pollutants regulated under BPT/BCT (BOD, TSS, and pH), COD, and the toxic and nonconventional pollutants regulated under BAT (122 organic PAIs and 28 priority pollutants). NSPS being proposed today are presented in Table 3 of today's proposed rule.

The Agency is proposing that each new source discharger in Subcategory A be subject to the standards for the pollutants regulated in this subcategory. Once a pollutant is regulated, the regulation will serve as the basis for the limitations in the NPDES permits issued to new source direct dischargers. The monitoring requirements established by the permitting authority for new source pesticide chemicals manufacturing plants would include an analysis for all regulated conventional pollutants and priority pollutants, and for only the PAIs used or manufactured at each plant.

### XIII. Pretreatment Standards for Existing Sources

#### A. Need for Pretreatment Standards

Indirect dischargers in the pesticide manufacturing industry, like the direct dischargers, use as raw materials, and produce as products or byproducts many nonconventional pollutants (including PAIs) and priority pollutants. As in the case of direct dischargers, they may be expected to discharge many of these pollutants to POTWs at significant mass or concentration levels, or both. EPA estimates that indirect dischargers of organic pesticides annually discharge approximately 110,000 pounds of PAIs and 29,000 pounds of priority pollutants to POTWs.

EPA determines which pollutants to regulate in PSES on the basis of whether or not they pass through, interfere with, or are incompatible with the operation of POTWs (including interference with sludge practices). The Agency evaluates pollutant pass through by comparing the pollutant percentage removed by POTWs with the percentage removed by BAT technology applied by direct dischargers. A pollutant is deemed to pass through POTWs when the average percentage removed nationwide by well-operated POTWs (those meeting secondary treatment requirements) is less than the percentage removed by directly discharging pesticides manufacturing facilities applying BAT for that pollutant.

There is very little empirical data on the PAI removals actually achieved by

POTW's. Therefore, the Agency is relying on lab data to estimate the PAI removal performance that would be achieved by biotreatment at well-operated POTWs applying secondary treatment. The results of this laboratory study are reported in the Domestic Sewage Study (DSS) (Report to Congress on the Discharge of Hazardous Waste to Publicly Owned Treatment Works, February 1986, EPA/530-SW-86-004). The DSS provides laboratory data under ideal conditions to estimate biotreatment removal efficiencies at POTWs for different organic PAI structural groups.

For each of these PAI structural groups, the DSS shows that BAT removal efficiencies are considerably greater than the PAI removals achieved by biotreatment under laboratory conditions (99% removal by BAT versus an optimistic estimate of 50% or less removal by the POTW as reported in the DSS). Results of this analysis indicate that organic PAIs that could be efficiently removed by pretreatment technologies would pass through the treatment systems at POTWs.

In addition to pass-through, many of the pollutants in pesticide manufacturing wastewaters are present at concentrations which may inhibit biodegradation in POTW operations (as described in section XVII of today's notice). In some cases, discharges into POTWs have caused severe upsets at POTWs resulting in documented pass-through of PAIs and operational problems at the POTWs. Details of the pass-through analysis are discussed in section 7 of the Technical Development Document for today's proposed rule.

To evaluate the need for PSES for the priority pollutants, EPA relied on an analysis originally done to support the OCPSF regulations. See section 6 of the OCPSF Technical Development Document. Prior to promulgation of the OCPSF effluent guidelines, EPA conducted a study of well-operated POTWs that use biological treatment (the "50-Plant Study"). The 50-Plant study determined the extent to which priority pollutants are removed by POTWs. The principal means by which the Agency evaluated pollutant pass-through was to compare the pollutant percentage removed by POTWs with the percentage removed to comply with BAT limitations.

Because some of the data collected for evaluating POTW removals included influent levels of priority pollutants that were close to the detection limit, the POTW data were edited to eliminate influent levels less than 100 parts per billion (ppb) and the corresponding effluent values, except in cases where

none of the influent concentrations exceeded 100 ppb. In the latter case, where there were no influent data exceeding 100 ppb, the data were edited to eliminate influent values less than 20 ppb and the corresponding effluent values. These editing rules were used to allow for the possibility that low POTW removals simply reflected the low influent levels.

EPA then averaged the remaining influent data and also averaged the remaining effluent data for the POTWs. The percent removal achieved for each priority pollutant was determined from these averaged influent and effluent levels. This percent removal was then compared to the percent removal achieved by BAT treatment technology. Based on this analysis, EPA determined that 47 priority pollutants of the 63 priority pollutants regulated under OCPSF passed through POTWs. Not all of these priority pollutants are present in pesticides manufacturers wastewaters. As noted, 23 of the priority pollutants present in OCPSF wastewaters are also present in pesticides manufacturers wastewaters. The OCPSF pass through analysis shows that 21 of those 23 priority pollutants pass through; the only priority pollutants of those 23 that do not pass through are 2-chlorophenol and 2,4-dichlorophenol.

Consistent with the OCPSF rulemaking, EPA is setting the pretreatment standards for existing sources for the priority pollutants equal to the set of BAT limitations that applies to plants that do not have end-of-pipe biological treatment. In the OCPSF pass-through analysis for setting pretreatment standards, POTW removals were compared to BAT-level removal at plants that did not have end-of-pipe biological treatment. (See discussion in section XI above of the extent to which EPA considered end-of-pipe biological treatment in the determination of BAT removal levels for toxic pollutants.)

There is very little data to determine POTW removals for the four brominated priority pollutants: bromomethane, bromoform (tribromomethane), dibromochloromethane, and bromodichloromethane. However, these pollutants are structurally very similar to chloromethane and chloroform (trichloromethane), which were shown to pass through by the OCPSF analysis. In addition, EPA sampling at pesticide plants where the brominated priority pollutants are found shows that extensive volatilization occurs in sewers rather than removal via treatment, and we would expect similar volatilization to occur when the pollutants are



discharged to a POTW. This volatilization would not occur with BAT treatment, which removes (and destroys or recycles) the pollutants from the wastewater before volatilization can occur. Therefore, EPA proposes to determine that pass-through does occur for these four brominated priority pollutants.

Based on the 50-plant study, the average percent removal of cyanide by well-operated POTW's achieving secondary treatment is about 54 percent whereas, based on full-scale data, the Option 1 BAT technology removes more than 99 percent. Therefore, pass through does occur for cyanide.

Based upon the above considerations, EPA has concluded that PSES regulations are warranted for all of the pollutants regulated under BAT for direct dischargers, except 2-chlorophenol and 2,4-dichlorophenol.

General pretreatment regulations applicable to all existing and new source indirect dischargers appear in 40 CFR part 403. These regulations describe the Agency's overall policy for establishing and enforcing pretreatment standards for new and existing users of a POTW and delineate the responsibilities and deadlines applicable to each party in this effort. In addition, § 403.5(b) outlines prohibited discharges that apply to all users of a POTW.

#### B. PSES Technology Options and Selections

Indirect discharging organic pesticide manufacturing facilities generate wastewaters with similar pollutant characteristics as direct discharging facilities. Hence, the same treatment technologies discussed previously for BAT are considered applicable to PSES.

The Agency considered the following two options in developing PSES for Subcategory A:

1. *Option 1: Treated Discharge.* Under this option, PSES for organic PAIs would be set equal to the BAT Option 1 guidelines based on the use of hydrolysis, activated carbon, chemical oxidation, resin adsorption, solvent extraction, and/or incineration, and on water reuse or lack of water use in certain cases. The PSES for priority pollutants would be transferred from the PSES established for OCPSF.

2. *Option 2: Zero Discharge.* Option 2 for Subcategory A indirect dischargers would require zero discharge of pesticide manufacturing wastewater through recycle, reuse, or off-site or on-site incineration of wastewater.

EPA is proposing Option 1 technologies as the basis for the proposed PSES for the organic pesticide

chemicals manufacturing subcategory. Option 1 is economically achievable (see section XVI of today's notice) and greatly reduces pollutants discharged into the environment, compared to the zero discharge option (Option 2), thus furthering cross-media and pollution prevention concerns. That is, pollutants not recycled or reused are destroyed by treatment rather than transferred to another media. Option 2 is proposed to be rejected because of the cross-media implications of the transfer of pollutants as well as the severe economic impacts that would result from implementing this option. See section XVI of today's notice.

#### C. Calculation of PSES

The proposed pretreatment standards for existing sources in the organic pesticides chemicals manufacturing subcategory are presented in Tables 2 and 6 of today's proposed rule. The PSES standards are shown for both PAIs and priority pollutants. As with BAT, proposed standards for organic PAIs are expressed in terms of mass-based standards and, where appropriate, compliance with PSES is required by in-plant monitoring (i.e., where monitoring at end-of-pipe is impracticable due to dilution and consequent pollutant concentrations below detection levels). The priority pollutant standards are concentration-based. The proposed PSES for PAIs and priority pollutants would require dischargers to meet "maximum for any one day" and a "maximum monthly average" standard. The proposed PSES limitations for PAIs are identical to those limits established for these pollutants under proposed BAT Option 1. The PSES standards for the 21 priority pollutants common to both pesticides manufacturers and OCPSF wastewaters are identical to those established for these pollutants under PSES for OCPSF.

#### D. Applicability of PSES Limitations

The Agency is proposing PSES limitations under the organic pesticide chemicals manufacturing subcategory for the same 122 organic PAIs proposed under BAT for this subcategory. The Agency is proposing PSES for 26 of the 28 priority pollutants that are proposed for BAT. As discussed above, the Agency has determined that 2-chlorophenol and 2,4-dichlorophenol do not pass through POTWs and do not cause interferences at POTWs.

#### E. Removal Credits

Congress has recognized that even when a pollutant is deemed to pass through a POTW, the POTW nevertheless in certain cases may in fact

be removing a non-trivial amount of the pollutant. As a result, Congress established a discretionary program for POTWs to grant "removal credits" to industrial users (section 307(b) of the Act, 33 U.S.C. 1317(b)). The removal credit, in the form of a less stringent pretreatment standard, allows an increased amount of pollutants to flow from an industrial user's plant to the POTW.

Section 307(b) establishes a three-part test for obtaining removal credit authority. Removal credits may only be awarded if:

(1) The POTW "removes all or any part of [the] toxic pollutant" for which credits are being granted;

(2) The POTW's ultimate discharge does "not violate that effluent limitation or standard which would be applicable to such toxic pollutant if it were discharged by [the industrial user] other than through a POTW"; and

(3) The treatment of the industrial user's wastestream "does not prevent sludge use or disposal by such [POTW] in accordance with Clean Water Act section 405 . . .".

EPA removal credit regulations are set forth at 40 CFR 403.7. The United States Court of Appeals for the Third Circuit invalidated parts of the removal credit regulations on April 30, 1986. (*Natural Resources Defense Council v. EPA*, 790 F.2d 289, 292, 3rd Cir. 1986.) The court ruled that, *inter alia*, EPA may not authorize any POTW to grant removal credits until comprehensive sludge regulations are promulgated under section 405 of the Act.

On October 9, 1991, EPA published its final rule regulating municipal solid waste landfills (MSWLF) (56 FR 50977). The Solid Waste Disposal Facility Criteria final rule revises 40 CFR Part 257 and adds part 258. The rule applies to MSWLFs which co-dispose household wastes and sewage sludge. This rule satisfies a portion of EPA's obligations under CWA sec. 405(d) to promulgate standards for sludge use and disposal. As a result, POTWs that dispose of all of their sludge in a co-disposal MSWLF will be eligible to seek removal credit authority. In order to obtain removal credit authority, a POTW must dispose of all of its sludge in a MSWLF and the landfill must be in compliance with part 258. In addition, the POTW must meet the other requirements for removal credits set forth at 40 CFR part 403.

#### F. Compliance Date

EPA is proposing to establish a three-year deadline for compliance with PSES. Design and construction of systems adequate for compliance with PSES will



be a substantial undertaking for many pesticide chemicals manufacturing indirect dischargers, due to the technical complexity of the tasks of characterizing various plant wastewaters, assessing various treatment combinations, and installing different treatment units for particular product/processes and particular pollutants. Thus, EPA believes that a three-year compliance period is appropriate.

This compliance period is consistent with the 1987 rulemaking for OCPSF plants, which gave plants three years to come into compliance with OCPSF pretreatment standards. There are many plants that manufacture both organics chemicals and pesticides. These plants will be subject to both the OCPSF pretreatment standards (40 CFR part 414) and the pesticides manufacturers pretreatment standards. In some cases the plant will be subject to two sets of limitations on the same pollutant; in others, the PSES technology identified for an OCPSF pollutant will be the same as the PSES technology identified for the control of different pollutants under the pesticides manufacturers rule. In either case, the plant may already have installed the technologies necessary to meet the PSES limitations being proposed today. EPA therefore considered whether to require a PSES compliance period for pesticides manufacturers that is shorter than three years where appropriate, to account for the fact that some combined pesticides/OCPSF plants have already installed the necessary PSES technologies by this time. The Agency believes, however, that it needs to allow a full three years for those plants to come into compliance, since the technologies they have installed to meet the OCPSF standards may have been sized only to meet those standards and may not currently be capable of meeting the combined OCPSF and pesticides standards. Nevertheless, EPA specifically requests comment on whether it should allow a full three years for compliance with PSES, or whether a shorter time is appropriate where plants are already subject to PSES standards from the OCPSF industrial category.

#### G. PSES Pollutant Removals, Costs, and Economic Impacts

EPA estimates that the proposed PSES regulation will result in the removal of 105,000 pounds per year of pesticide active ingredients, and 27,000 pounds per year of volatile priority pollutants. As a result, use of steam strippers to remove volatile pollutants would reduce air emissions by nearly 27,000 pounds per year. Most of these volatile

pollutants are currently emitted to the air in sewers and biological treatment systems. PSES is estimated to result in capital costs of approximately \$9.4 million, and annualized costs of just over \$5.9 million (1986 dollars). There are no plant closures anticipated as a result of the proposed PSES regulation. One facility is projected to close a product line as a result of the regulation, with job losses equivalent to 97 full time employees projected to occur as a result of the product line closure and the decrease in demand resulting from higher prices. No additional firms are expected to experience significant financial impacts as a result of compliance with PSES. (See section XVI, "Economic Considerations.")

#### H. Pretreatment Standards for Subcategory B

The Agency proposes to reserve PSES for Subcategory B. For Subcategory B plants, EPA considered imposing PSES (equal to the existing BPT (i.e., requiring no discharge of process wastewater pollutants), but determined that the only way the facilities could achieve this standard is by off-site disposal (incineration). Off-site disposal was determined not to be economically achievable because two of the five facilities in this subcategory are projected to close if forced to meet that standard (see section XVI of today's notice). Other options, such as imposing treated discharge requirements, were considered unnecessary since the existing indirect dischargers are subject to locally imposed pretreatment limits which EPA believes provide adequate protection for the POTW and the environment. The five existing facilities are treating their discharges in accordance with these limits and together are discharging only 60 pounds of priority pollutants and PAIs annually. Further, imposing the control technologies that are the bases for the BAT limitations being proposed today (i.e., Option 1, physical/chemical treatment) would result in the additional removal of only 3.0 pounds annually of priority pollutants and PAIs from these five facilities. In light of the relatively small amount of pollutants being discharged, EPA proposes not to establish regulations for existing indirect dischargers in the metallo-organic pesticides manufacturing subcategory.

#### XIV. Pretreatment Standards for New Sources

Section 307(c) of the Act calls for EPA to promulgate pretreatment standards for new sources (PSNS) at the same time that it promulgates new source

performance standards (NSPS). New indirect discharging facilities, like new direct discharging facilities, have the opportunity to incorporate the best available demonstrated technologies, including process changes, in-plant controls, and end-of-pipe treatment technologies.

The same technologies discussed previously for BAT, NSPS, and PSES are available as the basis for PSNS. Proposed PSNS for Subcategory A are based on the proposed PSES technologies identified in the previous section, modified to reflect the flow reduction capable at certain new facilities (as described above for NSPS). EPA also considered a zero discharge option, as for PSES, but it was rejected for the same reasons of economic impact and cross media implications (see the NSPS discussion above).

The proposed pretreatment standards for new sources for Subcategory A are presented in Tables 3 and 6 of today's proposed rule. The PSNS standards are shown for both PAIs and priority pollutants. As with PSES, the PAI standards are production-based mass limits while the priority pollutant standards are concentration-based.

The Agency is proposing to establish PSNS regulations under Subcategory A for the same 122 organic PAIs proposed for regulation under NSPS. The Agency is also proposing PSNS for 26 of the 28 priority pollutants addressed under NSPS. Two priority pollutants, 2-chlorophenol and 2,4-dichlorophenol, are determined not to pass through a POTW and therefore are not proposed for regulation by PSNS. As discussed above for the proposed PSES, EPA determined which priority pollutants to regulate under PSNS on the basis of whether or not they pass through, cause upsets, or otherwise interfere with the operation of POTWs (including interference with sludge disposal practices). A detailed discussion of the pollutants considered and selected for proposed regulation in the pesticide chemicals manufacturing industry is provided in section 6 of the technical Development Document for today's proposed rule.

Under Subcategory B, the Agency is proposing to reserve PSNS. The Agency believes it is unlikely that there will be any new manufacturers of the metallo-organic pesticides currently being manufactured. New manufacturing plants, to the extent there are any, would very likely produce only new pesticides not registered in 1986. Unlike organic pesticide chemicals, where new producers of currently manufactured pesticides are possible, EPA believes that new producers are unlikely.



because there have been no new plants in the metallo-organic pesticide industry for more than 20 years and because the current PAIs produced are the same as those produced over the past 20 years (i.e., there have been no new metallo-organic PAIs in 20 years). Therefore, the Agency does not believe there will be any new sources, and there is no need for PSNS.

#### *XV. Pollutants Not Regulated*

##### *A. Priority Pollutants Not Regulated*

Of the 126 priority pollutants listed in 40 CFR part 423 appendix A, 28 are being proposed for regulation as priority pollutants, three are being proposed for regulation as PAIs under this rulemaking, and 95 are not being proposed for regulation.

EPA's sampling of pesticide chemicals manufacturing process wastewater detected 70 priority pollutants (58 organic pollutants, 11 metals, and cyanide). The industry itself identified a total of 60 priority pollutants, including an additional 14 priority pollutants (12 organic priority pollutants and 2 priority pollutant metals) not detected during EPA sampling. Thus, a total of 84 priority pollutants were reported or detected in plant wastewater. However, 26 of the 70 priority pollutants detected by EPA sampling were detected at only one or two plants.

As stated in section VII of today's notice, EPA followed a series of steps to confirm the presence of a priority pollutant in cases where priority pollutants were reported detected in only one or two samples at any sample site. First, EPA examined samples collected at other sites at the same facility for reported detections of that same pollutant in pesticide manufacturing process wastewater at any of those other sites. Second, EPA examined the details of the production process to determine if the pollutant was a raw material or by-product, or likely contaminant of raw materials or solvents. Finally, EPA contacted knowledgeable plant personnel to determine if the pollutant was a known or likely contaminant, and to determine if the plant had also detected the pollutant during sampling, particularly during sampling conducted the same day EPA sampled and analyzed by the same or a similar analytical method. If EPA could not confirm the presence of the priority pollutant by any of these methods, EPA concluded that the result represented a bad sample and that the priority pollutant was not, in fact, present. Therefore, EPA is not proposing effluent limitations for these 26 priority pollutants because the reported

detections of these priority pollutants are believed to be in error.

For other priority pollutants, both EPA sampling and industry data show that many of these pollutants are detected in only trace amounts. At trace levels, the pollutants are not treatable by current technologies, and also are below levels likely to cause any adverse effects.

In sum, EPA is not setting regulations for 95 priority pollutants for one or more of the following reasons:

(a) The pollutant is deemed not present in pesticides manufacturing wastewaters, because it has not been detected in the effluent with the use of analytical methods promulgated pursuant to sec. 304(h) of the Act or with other state-of-the-art methods (39 pollutants).

(b) The pollutant is present only in trace amounts and is neither causing nor likely to cause toxic effects (20 pollutants).

(c) The pollutant was detected in the effluent from only one or a small number of samples and the pollutant's presence could not be confirmed (26 pollutants).

(d) The pollutant will be effectively controlled by the technologies upon which are based other effluent limitations guidelines and standards, particularly those required to comply with the PAI limitations proposed today (6 pollutants).

(e) Insufficient data are available to establish limitations (3 pollutants). As discussed in section VII above, these three pollutants would be expected to be present in wastewaters from manufacture of only three PAIs. Those three PAIs were not being manufactured during the time available for sampling and may not be manufactured in the future.

(f) No promulgated analytical method is available (one pollutant—*asbestos*).

Therefore, EPA is proposing effluent limitations for 26 organic priority pollutants and is not establishing limitations for the other 44 organic priority pollutants. Of the 13 priority pollutant metals detected, 12 are present in only trace amounts. Therefore, EPA is proposing limitations only for lead and not for the other 12 priority pollutant metals. EPA is also proposing limitations for total cyanide.

##### *B. Pesticide Active Ingredient Pollutants Not Regulated*

Under Subcategory A, 170 individual PAIs were manufactured in 1986; and 8 PAIs were manufactured from 1985–1989, but were not manufactured in 1986. Therefore, a total of 178 individual PAIs are considered for potential regulation. Of these, 122 individual PAIs are proposed for regulation today under

either BAT, NSPS, PSES, or PSNS. EPA is not proposing regulations for 56 individual PAIs. Of the 56 PAIs, all production ceased for 12 PAIs before we could gather data. Analytical methods are unavailable for 14 other PAIs, so we could not gather data. All wastewaters for 14 other PAIs are currently disposed of in deep wells subject to regulation under EPA's Underground Injection Control program. EPA decided to develop data and regulations for products with actual discharges to surface waters. For the remaining 16 PAIs, insufficient data exists on their treatability. Either the plants do not monitor for the PAI or the available data are inadequate to demonstrate that the technology in use is the best available technology. In addition, the available bench scale treatability data is inadequate and there are no structurally similar PAIs with data which could be transferred. Available toxicity data indicates that these 16 PAIs are less toxic than most of the 122 PAIs for which PAI effluent limitations are proposed.

#### *XVI. Economic Considerations*

##### *A. Introduction*

EPA's economic impact assessment is set forth in the report titled "Economic Impact Analysis of Proposed Effluent Limitations and Standards for the Pesticides Manufacturing Industry" (hereinafter "EIA"). This report details the investment and annualized compliance costs for the facilities covered by the pesticide manufacturer regulation. The report also estimates the probable economic effect of compliance costs in terms of facility closures, product line closures, profitability impacts, and ability to incur debt. Firm-level impacts, local community impacts, international trade effects, and effects on new pesticide manufacturing facilities are also presented. A Regulatory Flexibility Analysis detailing the small business impacts is also included in the EIA for this industry.

As discussed previously, a total of 90 pesticide manufacturing facilities owned and operated by 64 firms that manufacture one or more PAIs, are potentially subject to regulation. EPA has projected that 61 of these facilities will incur costs as a result of this regulation. The economic impacts on these 61 facilities were calculated separately for direct dischargers and indirect dischargers. Impacts on direct dischargers were calculated for compliance with a BAT regulation; impacts on indirect dischargers were calculated for compliance with PSES.



Each discharge category was further analyzed by the two subcategories: Organic Pesticide Chemicals Manufacturing (Subcategory A) and Metallo-organic Pesticide Chemicals Manufacturing (Subcategory B).

The costs and impacts of implementing the regulations are estimated on an active ingredient-specific basis for each facility. For the organic pesticides manufacturing subcategory (Subcategory A), total Option 1 BAT investment costs (capital and land) are projected to be \$14.9 million with annualized costs of \$14.7 million including depreciation and interest. Total investment costs for PSES Subcategory A are projected to be \$9.4 million with annualized costs of \$5.9 million including depreciation and interest.

#### COST OF IMPLEMENTING BAT AND PSES REGULATIONS FOR SUBCATEGORY A

(In millions of 1986 dollars)

	BAT	PSES
Capital Costs .....	\$14.9	\$9.4
Total Annualized Costs .....	\$14.7	\$5.9

The costs are presented in 1986 dollars and are based on the assumption that, whenever possible, facilities will improve to existing treatment rather than building new treatment. Although 90 facilities are potentially subject to the regulation, EPA only analyzed 88 facilities for economic impacts. Financial data were not obtained for one facility which was originally classified as a formulator/packager. The other facility for which economic impacts were not calculated is a research and development facility for which no revenues associated with in-scope PAIs. One of these facilities is expected to incur no cost under Option 1, and the other had only monitoring costs.

EPA also conducted an analysis of the cost-effectiveness of alternative treatment technology options. The results of this cost-effectiveness analysis are expressed in terms of the incremental costs per pound of toxic-equivalent removed. Toxic-equivalents weights are used to account for the differences in toxicity among the pollutants removed. The number of pounds of a pollutant removed by each option is multiplied by a toxic weighting factor. The toxic weighting factor is derived using ambient water quality criteria and toxicity values. The toxic weighting factors are standardized by relating them to copper. Cost-effectiveness is calculated as the ratio of

incremental annualized costs of an option to the incremental pounds-equivalent removed by that option. The report, "Cost-Effectiveness of Proposed Effluent Limitations Guidelines and Standards of Performance for the Pesticide Manufacturing Industry" (hereinafter, "Cost-Effectiveness Report"), is included in the record of this rulemaking.

The Agency recognizes that its data base, which represents conditions in 1986, may not exactly reflect current conditions in the industry today. Despite the fact that data obtained in the questionnaire are several years old and thus may not precisely match the present status of particular facilities, EPA believes that the data provide a sound and reasonable basis for assessing the overall ability of the industry to achieve compliance with the regulations. The purpose of the impact analysis is to characterize the impact of these regulations for the industry as a whole and for major groupings within the industry. EPA does not believe that changes within the industry during the past few years significantly modify the technical, cost or economic conclusions underlying the regulation.

#### B. Economic Impact Methodology

The EIA uses three primary impact measures: facility closures, product line closures, and other significant impacts short of closure. Analysis of significant impacts short of closure includes a composite measure of the effect of compliance costs on the ability facilities to incur debt and on facilities' return on assets. The analysis evaluates these impacts in a hierarchical manner: If a facility closes, product line closures and other significant impacts are not evaluated; if a facility sustains a product line closure, other significant impacts are not evaluated. The hierarchy corresponds to the severity of the projected impact. The impacts are estimated for pesticide manufacturing facilities incurring costs using a combination of data from the 1986 Facility Census and secondary sources, such as Compustat financial data, plus facility-specific compliance cost estimates developed by the Agency (see section IV.B of today's notice). Precompliance (baseline) estimates of each of the three primary impact measures are first calculated for each facility in order to gauge the economic vitality of each facility prior to the proposed regulation. If a facility fails one of the measures (e.g., a facility closes) in the baseline scenario, the model does not recount this same level of failure in the post-compliance scenario. The model does, however,

allow for progressively severe impacts due to compliance (e.g., a baseline product line closure may become a facility closure in the post-compliance scenario).

A pesticide manufacturing facility is defined, for purposes of this EIA, as the portion of the facility involved in manufacturing, formulating and packaging, or performing contract work for both in-scope pesticides (i.e., those 270 PAIs considered for regulation) and out-of-scope pesticides (all others). (Note that compliance cost estimates were developed only for the portion of the facility engaged in manufacturing one or more of the 122 PAIs.) The facility closure analysis uses a net present value approach (which compares discounted cash flow to salvage value) to project whether pesticide operations would remain open after regulatory costs are incurred. The first step in the closure analysis involved projecting baseline costs and revenues over the life of the facility. The projected regulatory costs were then added to the baseline costs and these post-compliance costs were used to estimate a post-compliance cash flow. A facility closure is projected to result from the regulation if the salvage value exceeds the present value of cash flow in the post-compliance scenario but not in the baseline.

A product line is defined as a cluster of pesticide active ingredients which are close substitutes for a specific end-use. For example, insecticides used on corn is one product line. Fifty-five clusters or product lines were identified as part of the impact analysis. Forty-five of these clusters contain in-scope active ingredients which were produced in 1986. A baseline product line closure is projected if the unit cost (average variable cost plus average fixed cost per pound of active ingredient) of the product line exceeds the unit price (average price per pound of active ingredient). EPA obtained prices from the 1986 Facility Census when available. When prices were not provided in the Census, they were obtained from secondary sources including Doane's Annual Marketing Survey and DPRA's Agchemprice. A post-compliance product line closure is projected if the product line remained open in the baseline, but the addition of compliance costs results in unit costs exceeding unit price.

Other significant impacts of compliance with the effluent limitations, short of closure, are calculated based on a comparison of two key financial ratios for each facility with industry averages of these ratios. The financial ratios used are "times interest earned" (earnings



before interest and taxes divided by interest expense) and "return on total assets" (earnings before interest and taxes divided by assets). If a facility falls in the lowest quartile for the industry in the post-compliance scenario but not in the baseline it is said to sustain a significant impact short of closure.

EPA evaluated each of these measures assuming that the market allows a facility to pass on to the customer part of the compliance costs incurred by pesticide manufacturers as a price increase. EPA also evaluated each of these measures with the more stringent assumption that the facility would not be able to pass on to the customer any of the compliance costs incurred. The extent to which manufacturers are expected to raise prices is calculated as a function of the level of competition of out-of-scope pesticides with in-scope pesticides for each pesticide cluster. The level of competition is estimated based on relative production quantities. The greater the competition from out-of-scope pesticides, the smaller the fraction of costs a producer is assumed to be able to pass on. Demand changes corresponding to these price changes are then calculated using an estimate of the price elasticity of demand for each cluster.

#### C. Baseline Analysis

The baseline economic analysis evaluated each facility's financial operating condition prior to incurring compliance costs for this regulation. This analysis included the estimated costs associated with two significant EPA regulations which were not in place in 1986 (the base year) and whose costs were therefore not reflected in the annual operating expenses provided by the firm in the Section 308 Census. First, baseline cost additions include RCRA costs for relining surface impoundments that treat, store, and dispose of hazardous wastes. An estimated 34 facilities are projected to incur RCRA costs in the baseline. Annualized RCRA costs absorbed by all 34 of these facilities total \$645,000 (1986 dollars). Second, baseline cost additions also include compliance with the effluent guidelines for the OCPSP industry. Thirty of the 90 pesticide manufacturing facilities are projected to incur costs in order to comply with the OCPSP regulations. Capital and annualized OCPSP costs absorbed by these facilities total \$52.7 million and \$17.8 million, respectively (1986 dollars).

After incorporating the costs of RCRA and OCPSP regulations, it is projected that 15 of the 90 facilities close in the

baseline analysis. Three of these facilities have, in fact, closed since 1986; another two of these facilities have closed one or more product lines since that time. An additional 20 facilities are projected to close particular pesticide product lines. Seven of these 20 facilities have in fact either closed entirely or closed a pesticide product line since 1986.

#### D. Total Costs and Impacts of the Regulatory Options for BAT and PSES

EPA analyzed the impacts of two possible regulatory options for BAT and PSES: a discharge option (Option 1) and a zero discharge option based on on-site or off-site injection or incineration (Option 2). The economic impacts associated with these two options are discussed below, by discharge type and by each of the subcategories.

##### 1. Option 1: Treated Discharge

a. Impacts of Option 1 on Direct Dischargers. (1) Organic Pesticides Manufacturing (Subcategory A). For manufacturers included in this subcategory, the incremental capital and annualized total costs (which include capital, operating and manufacture, and monitoring costs) of complying with BAT limitations are expected to be \$14.9 million and \$14.7 million, respectively. No facilities are projected to close due to compliance with BAT. One facility, equal to three percent of the 32 direct discharge facilities covered under this subcategory, is projected to close a product line as a result of the regulation. (One other facility projected to close a product line is a zero discharger and only incurs monitoring costs.) No facilities are expected to experience other significant financial impacts short of facility or product line closure. Job losses totalling 31 full-time equivalents (FTE) are expected to occur as a result of the product line closures and the decrease in demand resulting from higher prices. This employment loss represents less than one percent of employment in the pesticide-related portions of all pesticide manufacturing facilities. One firm, equal to 1.5 percent of the 64 firms in the industry, is expected to experience significant financial impacts as a result of compliance with BAT. Foreign trade in pesticide active ingredients is expected to fall by \$5.5 million due to compliance with BAT. In 1986, the United States was a net exporter of PAIs, in the amount of \$897 million. Therefore, this decrease in PAI trade represents less than one percent of 1986 trade in PAIs. In 1986, the United States was a net importer of \$152 billion in merchandise. The BAT regulation therefore results in

an increase in net imports of less than one one-thousandth of one percent of the national trade balance of all goods.

(2) Metallo-Organic Pesticides Manufacturing (Subcategory B). No new limitations on direct dischargers are proposed today for the metallo-organic pesticide chemicals manufacturing subcategory. Therefore, there are no associated costs or economic impacts. The Agency proposes to reserve BAT regulations for manufacturers of Subcategory B pesticides.

b. Impacts of Option 1 on Indirect Dischargers. (1) Organic Pesticides Manufacturing (Subcategory A). For manufacturers included in the organic pesticides subcategory, the total capital and annualized costs of compliance with PSES are \$9.4 million and \$5.9 million, respectively. No facilities are projected to close due to compliance with PSES. One facility, or three percent of the 36 facilities covered under this subcategory, is projected to close a product line as a result of the regulation. No facilities are estimated to experience other significant financial impacts short of facility or product line closure. Job losses totalling 97 FTEs are expected to occur as a result of the product line closures and the decrease in demand resulting from higher prices. This employment loss represents less than one percent of employment in the pesticide-related portions of all pesticide manufacturing facilities. Two firms are expected to sustain significant financial impacts as a result of compliance with PSES. Foreign trade in pesticide active ingredients is expected to fall by 16.1 million dollars due to compliance with PSES. This decrease in trade represents about two percent of 1986 net exports of PAIs and about one-hundredth of one percent of the 1986 net national trade imports of all goods.

(2) Metallo-Organic Pesticide Manufacturers (Subcategory B). No new limitations on indirect dischargers are proposed today for the metallo-organic pesticide chemicals manufacturing subcategory. Therefore, there are no associated costs or economic impacts. The Agency proposes to reserve PSES regulations for Subcategory B.

##### 2. Option 2: Zero Discharge

a. Impacts of Option 2 on Direct Dischargers. (1) Organic Pesticide Manufacturing (Subcategory A). Compliance with limitations based on Option 2 is expected to cost manufacturers of Subcategory A pesticides \$1.13 million in incremental capital costs and \$4.81 billion in annualized costs. Total pesticide-related revenue for all 88 pesticide



manufacturing facilities equaled \$4.84 billion in 1986—only slightly greater than the projected annualized Option 2 compliance costs for direct dischargers in this subcategory.

Sixteen facilities (50 percent of the 32 direct discharge facilities in this subcategory) are projected to close due to compliance with Option 2. Three additional facilities, equal to ten percent of the 32 direct discharge facilities covered under this guideline, are projected to close a product line under Option 2. (One of the facilities expected to close a product line is a zero discharger and only incurs monitoring costs. The 32 facilities against which impacts are compared do not include zero dischargers. Therefore, the percentage of facilities affected is overstated.) No facilities are expected to experience other significant financial impacts short of facility or product line closure. Job losses totalling 7,110 full-time equivalents are expected to occur as a result of the facility closures, product line closures and the decrease in demand resulting from higher prices. This employment loss represents 72 percent of employment in the pesticide-related portions of all pesticide manufacturing facilities. Seven firms, equal to about eleven percent of the 64 firms in the industry, are expected to experience significant financial impacts as a result of compliance with Option 2. Foreign trade in pesticide active ingredients is expected to fall by \$2.4 billion, shifting the U.S. PAI balance of trade from a \$897 million exporter in 1986 to a \$1.5 billion importer. The U.S. national net imports of merchandise would increase by about two percent.

(2) Metallo-Organic Pesticide Manufacturers (Subcategory B). No new limitations on direct dischargers are proposed today for the metallo-organic pesticide chemicals manufacturing subcategory. Therefore, there are no associated costs or economic impacts.

b. Impacts of Option 2 on Indirect Dischargers. (1) Organic Pesticide Manufacturers (Subcategory A). For manufacturers of organic pesticides, the total capital and annualized costs of compliance with Option 2 are estimated to be \$1.1 million and \$518.8 million, respectively. Eleven facilities (31 percent of the 36 facilities with indirect discharges in this subcategory) are projected to close if forced to comply with Option 2. Three facilities (8 percent of the 36 facilities with indirect discharges in this subcategory) are projected to close a product line as a result of Option 2. No facilities are expected to experience other significant financial impacts short of facility or

product line closure. Job losses totalling 802 full-time equivalents are expected to occur as a result of the facility closures, product line closures and the decrease in demand resulting from higher prices. This employment loss represents 8 percent of employment in the pesticide-related portions of all pesticide manufacturing facilities. Seven firms, equal to about eleven percent of the firms in the industry, are expected to sustain significant financial impacts as a result of compliance with Option 2. Foreign trade in pesticide active ingredients is expected to fall by 179.6 million dollars due to compliance with Option 2. This decrease in trade represents 20 percent of 1986 U.S. net exports of PAIs and 0.12 percent of 1986 net national imports of all goods.

(2) Metallo-Organic Pesticide Manufacturers (Subcategory B). No new limitations on indirect dischargers are being proposed for the metallo-organic pesticide chemicals manufacturing subcategory. Therefore, there are no associated costs or economic impacts.

#### E. Cost-Effectiveness Analysis

In addition to the foregoing analyses, the Agency has performed a cost-effectiveness analysis. For each option, the estimated pounds-equivalent removed were calculated by weighting the number of pounds of each pollutant removed by the relative toxic weighting factor for each pollutant. The use of pounds-equivalent gives correspondingly more weight to more highly toxic pollutants. Thus, for a given expenditure and pounds of pollutants removed, the cost per pound-equivalent removed would be lower when more highly toxic pollutants are removed than if pollutants of lesser toxicity are removed. Cost-effectiveness is calculated as the ratio of the incremental annual costs to the incremental pounds-equivalent removed for each option. So that comparisons of the cost effectiveness among other regulated industries may be made, annual costs for all cost-effectiveness analyses are reported in 1981 dollars.

The cost-effectiveness methodology used in this analysis takes into account reduction of air emissions of volatile organic chemicals expected to result from use of the model technology (steam stripping) upon which the effluent limitations and standards for volatile priority pollutants are based. Reductions in air emissions of these pollutants is counted in computing the cost-effectiveness of the regulations since the best available treatment technologies identified for the regulation reduce these emissions. The toxic weighting factors used take into account the toxicity and

carcinogenicity of these chemicals to humans through inhalation. The incremental cost-effectiveness results for the two regulatory options and two discharge statuses are shown in the following tables.

The cost-effectiveness values for the indirect dischargers (PSES) shown in the tables account for the reduction that would occur in the discharge of Malathion. Until recently, a large amount of Malathion was being discharged indirectly by a single plant, and the cost-effectiveness estimates shown below were developed assuming the occurrence of this discharge. EPA has recently been informed that this plant has ceased production of Malathion and does not plan to manufacture it in the future. EPA notes that the cost-effectiveness value of \$1 per pound-equivalent shown in the table for Option 1 would increase to \$18 per pound-equivalent if the reduction of Malathion were not considered in the cost-effectiveness analysis.

#### COST-EFFECTIVENESS FOR THE TREATED DISCHARGE OPTION (OPTION 1)

[1981 dollars]

	Total removals (lbs)	Total removals (copper lb-eq.)	Cost-effectiveness value (\$/lb-eq.)
BAT Subcategory A	5,994,072	1,198,882	\$10
PSES Subcategory A	109,176	4,832,553	1

#### COST-EFFECTIVENESS FOR THE ZERO DISCHARGE OPTION (OPTION 2)

[1981 dollars]

	Total removals (lbs)	Total removals (copper lb-eq.)	Cost-effectiveness value (\$/lb-eq.)
BAT Subcategory A	6,038,299	1,375,819	\$2,841
PSES Subcategory A	110,495	4,860,338	76

Note: 1981 dollars are used to make all Agency Cost-Effectiveness analyses as comparable as possible.

#### F. Effects of the Proposed Regulation on New Sources (NSPS and PSNS)

1. Subcategory A. EPA is proposing to establish NSPS/PSNS for the organic pesticide chemicals manufacturing



subcategory equal to BAT/PSES limitations for PAIs, modified to reflect a wastewater flow reduction of 28 percent in some cases. NSPS for priority pollutants is being set equal to the BAT limitations.

The projected impact of the proposed regulation on new sources is expected to be less burdensome than the impact of the BAT/PSES regulations on existing sources. Designing a new technology prior to facility construction is typically less expensive than retro-fitting a facility for a new technology. Since compliance with the discharge option (Option 1) has been found to be economically achievable for existing facilities, it is expected that compliance with Option 1 will also be achievable for new sources.

For Option 2, the economic impacts are projected to be the same as for Option 2 BAT (i.e., very high and unachievable), because costs are from on-going incineration (and possible transporting); these costs would be the same for new plants and existing ones.

2. *Subcategory B.* NSPS/PSNS for metallo-organic pesticide chemicals are not being proposed at this time. Therefore, there are no associated impacts on new sources.

#### G. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq., Pub. L. 96-354) calls for the Agency to prepare a Regulatory Flexibility Analysis (RFA) for proposed regulations that have a significant impact on a substantial number of small entities. The purpose of the Act is to ensure that, while achieving EPA's statutory goals, the Agency's regulations do not impose disproportionate impacts on small entities.

Both the treated discharge option and the zero discharge option were evaluated to determine their impacts on small entities. For each of these options, the effects of the BAT and PSES regulations were separately considered. The analysis proceeded in three steps. The first step was a screening test to evaluate whether the proposed regulations are expected to have a significant impact on a substantial number of small entities. If such an impact was detected, the analysis proceeded to a second stage in which logistic regression was used to evaluate whether small entities would be disproportionately impacted by the proposed regulation. Finally, if the impacts appeared to be disproportionate, alternative regulatory options would be considered.

For the first stage of analysis, EPA defined a small entity based on the Small Business Administration (SBA)

standards. The SBA has established standards based on employment at firms (including all affiliates and divisions) for each SIC group. For SIC 2869 (which includes pesticide manufacturers) the SBA defines a small business as one employing less than 1,000 people. Employment data for firms that own pesticides manufacturing facilities was obtained from Dun and Bradstreet's Million Dollar Directory. Consistent with the other components of the EIA, significant impacts were defined as facility closures, product line closures, or other significant financial impacts as previously discussed. Using these measures, the results of the small business analysis are discussed below for the two regulatory options.

#### 1. Option 1: Treated Discharge

a. BAT. As previously discussed, it is projected that two facilities will experience product line closures due to BAT regulations under this discharge option. No facility closures or other significant financial impacts are expected to occur. Both firms that are expected to experience facility product line closures have fewer than 1,000 employees. No further analysis was conducted since it was judged that the closure of two facility product lines did not constitute a "significant impact on a substantial number of small entities".

b. PSES. A single facility is expected to experience a product line closure under the PSES regulation. Using the SBA definition, the firm that owns this facility is not small. Since a "substantial number of small entities" are not expected to be affected by this regulation, no further analysis was conducted.

#### 2. Option 2: Zero Discharge

a. BAT. Of the firms with publicly-available employment data, using the SBA definition of small, two small firms are expected to have a facility close while one additional small firm will have a facility close a product line under this regulatory option.<sup>2</sup> There may be additional closures in the private firms for which employment data is not available. No facilities were expected to experience "other significant financial impacts" under this option. Since a significant number of small entities might be substantially impacted, an analysis of differential impacts was performed.

In the second stage of analysis, EPA considered five measures of the size of the "small entity":

- firm revenues

- total facility revenues
- total facility employment
- pesticide-related facility revenues
- pesticide-related facility employment

These size measures were plotted against the two impact measures: facility closure, and product line closure. The relationship between size and impacts was also tested statistically through logistic regression. An estimated coefficient of the size variable that was positive and statistically different from zero implies disproportionately large impacts on small entities. However, none of the regressions resulted in this conclusion. Therefore, the regulation is not expected to differentially impact small businesses and no regulatory flexibility analysis is required.

b. PSES. Of the firms with publicly-available employment data, using the SBA definition, five small firms are expected to have a facility close and an additional two firms are expected to have a facility close a product line under this regulatory option.<sup>3</sup> There may be additional closures in the private firms, for which employment data are not available. No small facilities were expected to experience "other significant financial impacts" under this option. Since a significant number of small entities might be substantially impacted, an analysis of differential impacts was again performed.

The same size measures, impacts, and regression were used as were discussed under the proposed BAT regulation. Again, none of the regressions resulted in the conclusion that small businesses will bear disproportionately large impacts of the regulation. Therefore, no regulatory flexibility analysis is required.

#### Executive Order 12291

Executive Order 12291 requires EPA and other agencies to perform a Regulatory Impact Analysis (RIA) of a major regulation. Major regulations are those that impose an annual cost to the economy of \$100 million or more, or meet other criteria described in the Order. The discharge option (Option 1), which EPA is proposing to adopt for pesticide manufacturers of organic chemicals, is projected to cost under \$100 million annually. This option therefore does not trigger the requirement of conducting an RIA. This rule was submitted to the Office of Management and Budget for review.

<sup>2</sup> A total of sixteen direct discharge facilities are projected to close under this option.

<sup>3</sup> A total of eleven indirect discharge facilities are projected to close under this option.



### I. Paperwork Reduction Act

Today's proposed rule will impose no increase in the reporting or record keeping burden to respondents as covered under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The proposed rule contains no information requirements.

### XVII. Water Quality Analyses

The water quality benefits of controlling the discharge from pesticide manufacturing facilities to surface waters and POTWs were evaluated in national analyses of direct and indirect discharges. All 122 PAIs proposed for regulation have at least one toxic effect (human health carcinogen and/or systemic toxicant or aquatic toxicant). In addition, many of these pollutants bioaccumulate and persist in the environment. While ambient monitoring for PAIs has been limited, studies have demonstrated the bioaccumulation of pesticides in aquatic life and accumulation of pesticides in sediments. Furthermore, human health impacts, primarily through worker exposure, have been reported (respiratory disease, liver impairment, and cancer incidence). Six cases of ground water contamination, four cases of surface water contamination and three cases of impairment of POTW operations have also been documented.

The effects of direct wastewater discharges on receiving stream water quality were evaluated at current and proposed BAT treatment levels for today's proposed rule. Twenty-four pesticide manufacturing facilities discharging 52 PAIs and 37 priority pollutants to 23 receiving streams were evaluated. Water quality models were used to project pollutant in-stream concentrations based on estimated releases at current and proposed treatment levels; the in-stream concentrations were then compared to EPA-published water quality criteria or to toxic effect levels documented where EPA water quality criteria are not available for certain PAIs.

In-stream pollutant concentrations for 8 pollutants are projected to exceed human health criteria or human toxic effect levels in 9 percent of the receiving streams at current and proposed discharge levels. At proposed discharge levels 7 pollutants are projected to exceed human health criteria or toxic effect levels, however, the magnitude of excursions are reduced by more than 10 fold. The percentage of receiving streams with in-stream pollutant concentrations projected to exceed chronic aquatic life criteria or aquatic toxic effect levels will be reduced from

22 percent at current discharge levels to 9 percent at proposed discharge levels. A total of 10 pollutants at current and 6 pollutants at proposed discharge levels are projected to exceed in-stream criteria or toxic effect levels.

In addition, the effects of POTW wastewater discharges of 29 PAIs and 34 priority pollutants on receiving stream water quality were evaluated at current and proposed treatment levels for 26 indirect discharging pesticide manufacturing facilities, which discharge to 20 POTWs on 19 receiving streams. Water quality models were used to project pollutant in-stream concentrations based on estimated releases at current and proposed treatment levels; the in-stream concentrations were then compared to EPA published water quality criteria or to toxic effect levels.

EPA projects that in-stream pollutant concentrations for 2 pollutants will exceed human health criteria or human toxic effect levels in 10 percent of the receiving streams at current and proposed discharge levels. The percentage of receiving streams with in-stream pollutant concentrations projected to exceed chronic aquatic life criteria or aquatic toxic effect levels would be reduced from 16 percent at current discharge levels to 5 percent at proposed discharge levels. A total of 3 pollutants at current and 1 pollutant at proposed discharge levels are projected to exceed in-stream criteria or toxic effect levels.

The potential impacts of 27 indirect discharging pesticide manufacturing facilities, which discharge to 21 POTWs were evaluated in terms of inhibition of POTW operation and contamination of sludge. Twenty-nine PAIs and 26 priority pollutants were evaluated for potential POTW operation inhibition. Three PAIs and 10 priority pollutants were evaluated for potential sludge contamination problems. At current discharge levels, inhibition and/or sludge contamination problems are projected to occur at 24 percent of the POTWs for a total of 6 pollutants while at proposed discharge levels inhibition and/or sludge contamination problems are projected to occur at 14 percent of the POTWs for a total of 4 pollutants.

The POTW inhibition and sludge values used in this analysis are not, in general, regulatory values. They are based upon engineering and health estimates contained in guidance or guidelines published by EPA and other sources. Thus, EPA generally is not basing its regulatory approach for proposed pretreatment discharge levels upon the finding that some pollutants

interfere with POTWs by impairing their treatment effectiveness or causing them to violate applicable sludge limits for their chosen disposal methods. (Rather, the proposed discharge limits are based upon a determination of pass through as explained earlier in the preamble.) However, the values used in the analysis do help indicate the potential benefits for POTW operation and sludge disposal that may result from the compliance with proposed pretreatment discharge levels.

### XVIII. Non-Water Quality Environmental Impacts

The elimination or reduction of one form of pollution may create or aggravate other environmental problems. Therefore, sections 304(b) and 306 of the Act call for EPA to consider the non-water quality environmental impacts of effluent limitations guidelines and standards. Accordingly, EPA has considered the effect of these regulations on air pollution, solid waste generation, and energy consumption.

#### A. Air Pollution

Pesticide facilities generate wastewaters that contain significant concentrations of organic compounds, some of which are also on the list of Hazardous Air Pollutants (HAP) in title 3 of the Clean Air Act Amendments (CAAA) of 1990. These wastewaters typically pass through a series of collection and treatment units that are open to the atmosphere and allow wastewaters containing organic compounds to contact ambient air. Atmospheric exposure of these organic-containing wastewaters may result in significant volatilization of both volatile organic compounds (VOC), which contribute to the formation of ambient ozone, and HAP from the wastewater.

VOC and HAP are emitted from wastewater beginning at the point where the wastewater first contacts ambient air. Thus, VOC and HAP from wastewater may be of concern immediately as the wastewater is discharged from the process unit. Emissions occur from wastewater collection units such as process drains, manholes, trenches, sumps, junction boxes, and from wastewater treatment units such as screens, settling basins, equalization basins, biological aeration basins, air or steam strippers lacking air emission control devices, and any other units where the wastewater is in contact with the air.

Today's proposed regulations are based on the use of steam stripping rather than air stripping as an in-plant technique for controlling volatile organic



compounds. Also, steam strippers are proposed in conjunction with chemical oxidations systems as a combined BAT-level technology to prevent air emissions of chlorinated priority pollutants from the chemical oxidation effluent.

No adverse air impacts are expected to occur due to the proposed regulations. Based on raw wastewater loading estimates, air emissions of volatile priority pollutants would decrease by six million pounds per year due to the use of steam stripping. (The development of wastewater loading estimates and air pollution reduction benefits due to in-plant steam stripping are discussed in detail in section 8 of the Technical Development Document.) The proposed regulation, however, does not require steam stripping or any specific technology, but only establishes the amount of pollutant that can be discharged to navigable waters. As noted in section XI.C.1 above, the Agency in the OCPSF rule concluded that the issue of volatile air emissions is best addressed under laws that specifically direct EPA to control air emissions. (EPA notes, however, that all of the pesticides manufacturing plants that currently use stripping are using steam strippers and not air strippers.) There are, in fact, activities underway under the Clean Air Act to address emissions of VOCs from industrial wastewater. Specifically, the Agency plans to issue a Control Techniques Guideline (CTG) for Industrial Wastewater (IWW) under section 110 of the CAA (title 1 of the 1990 CAAA). The Pesticide Industry is one of several industries that would be covered by the IWW CTG. The IWW CTG will provide guidance to the State recommending reasonably available control technology (RACT) for VOC emissions from industrial wastewater at facilities located in areas failing to attain the National Ambient Air Quality Standards for ozone. The Agency also plans to issue a National Emission Standard for Hazardous Air Pollutants (NESHAP) under section 112 of the CAA to address air emissions of the HAP listed in title 3 of the 1990 CAAA. This Pesticide NESHAP will define maximum achievable control technology (MACT). MACT standards are technology-based standards. The 1990 CAAA set maximum control requirements on which MACT can be based for new and existing sources. RACT for the CTG and MACT for the NESHAP will be based on the same control strategy. That control strategy is:

1. Identify wastewater streams requiring control;

2. Control the conveyance of the wastewater to the treatment unit (hardpipe, control vents and openings);

3. Treat the wastewater to remove or destroy the organic compound (e.g. steam stripping);

4. Control air emissions from the treatment unit;

5. Control residuals removed during treatment.

In view of the upcoming air emission guidelines and standards, the Agency encourages facilities to consider integrated multi-media approaches when designing methods of complying with the upcoming pesticide effluent guidelines. Combining compliance with the effluent guidelines and upcoming CAA regulations will be more economical than individual compliance with each rule.

#### B. Solid Waste

Solid waste would be generated due to the following technologies, if implemented to meet proposed regulations: Steam stripping, hydroxide precipitation, and biological treatment. The solid wastes generated due to the implementation of the technologies discussed above were costed for disposal by off-site incineration. These costs were included in the economic evaluation of the proposed technologies.

The overhead stream from steam stripping will generally contain organic waste. In some cases, due to the large volume of the overhead stream, the Agency costed two steam strippers in series, with the second steam stripper treating the overheads stream from the first stripper. In these cases, the only organic waste that would need disposal is the overheads from the second steam stripper. EPA estimates that about 12 million pounds per year of organic waste would be generated due to steam stripping at 16 facilities.

Hydroxide precipitation technology utilizes calcium hydroxide or a similar chemical reagent to treat metal-containing wastewaters. The precipitated solids represent a solid waste. It is estimated that 31 thousand pounds per year of precipitated solids would be generated due to the implementation of hydroxide precipitation at one facility.

Biotreatment is the proposed technology for controlling PAI wastewater discharges at two facilities. Biosludge is continuously generated during biotreatment, and part of the sludge must be discharged from the treatment system to ensure proper operation. It is estimated that 48,000 pounds per year of biosludge would be generated due to the proposed regulations. For comparison, EPA

estimates that all POTW's combined generate more than 7.7 million tons of sludge annually, while compliance with OCPSF BAT effluent guidelines is projected to increase solid waste generation by over 22,000 tons annually.

#### C. Energy Requirements

EPA estimates that the attainment of BAT, NSPS, PSES, and PSNS will increase energy consumption by a small increment over present industry use. The main energy requirement in today's proposed rule is to generate steam used by the proposed steam strippers. Steam provides the heat energy necessary to separate volatile pollutants from wastewater streams treated by this technology. It is estimated that about 800 million pounds per year of steam would be required by steam strippers operating at 16 facilities. This would require approximately 187,000 barrels of oil annually; the United States currently consumes about 19 million barrels per day. Energy requirements will also increase minimally due to pumping needs associated with the proposed technologies.

#### XIX. Regulatory Implementation

##### A. Upset and Bypass Provisions

A recurring issue is whether industry limitations and standards should include provisions authorizing noncompliance with effluent limitations during periods of "upset" or "bypass". An upset, sometimes called an "excursion," is an unintentional noncompliance occurring for reasons beyond the reasonable control of the permittee. EPA believes that upset provisions are necessary because such upsets will inevitably occur due to limitations in control technology. Because technology-based limitations can require only what technology can achieve, it is claimed that liability for such situations is improper. When confronted with this issue, courts have been divided on the question of whether an explicit upset or excursion exemption is necessary or whether upset or excursion incidents may be handled through EPA's exercise of enforcement discretion. (Compare *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977) with *Weyerhaeuser v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978). See also *American Petroleum Institute v. EPA*, 540 F.2d 1023 (10th Cir. 1976); *CPC International Inc. v. Train*, 540 F.2d 973 (4th Cir. 1976); and *FMC Corp. v. Train*, 539 F.2d 973 (4th Cir. 1976).)

While an upset is an unintentional episode during which effluent limitations are exceeded, a bypass is an act of intentional noncompliance during



which wastewater treatment facilities are circumvented in emergency situations.

EPA has both upset and bypass provisions in NPDES permits, and has promulgated NPDES regulations which include upset and bypass permit provisions. (See 45 FR 33290, 33448; 40 CFR 122.60(g)(h), May 19, 1980). The upset provision establishes an upset as an affirmative defense to prosecution for violation of technology-based effluent limitations. The bypass provision authorizes bypassing to prevent loss of life, personal injury, or severe property damage. Since permittees in the pesticide manufacturing industry will be entitled to upset and bypass provisions in NPDES permits, these proposed regulations do not specifically repeat these provisions.

#### B. Variances and Modifications

Upon the promulgation of these regulations, the numerical effluent limitations for the appropriate subcategory must be applied in all Federal and State NPDES permits issued to direct dischargers in the pesticide manufacturing industry. In addition, the pretreatment standards are directly applicable to indirect dischargers.

For the BPT effluent limitations, the only exception to the binding limitations is EPA's "fundamentally different factors" ("FDF") variance (40 CFR part 125, subpart D). This variance recognizes factors concerning a particular discharger which are fundamentally different from the factors considered in this rulemaking. Although this variance clause was set forth in EPA's 1973-1976 effluent guidelines, it is now included in the NPDES regulations and not the specific industry regulations. (See 44 FR 32854, 32893 [June 7, 1979] for an explanation of the "fundamentally different factors" variance). The procedures for application for a BPT FDF variance are set forth at 40 CFR 122.21(m)(1)(i)(A).

Dischargers subject to the BAT limitations proposed in these regulations may also apply for an FDF variance, under the provisions of sec. 301(n) of the Act, which regulates BAT, BCT, and pretreatment FDFs. In addition, BAT limitations for nonconventional pollutants may be modified under sec. 301(c) and 301(g) of the Act. Under sec. 301(l) of the Act, these latter two statutory modifications are not applicable to "toxic" or conventional pollutants.

Dischargers subject to pretreatment standards for existing sources are also subject to the "fundamentally different factors" variance and credits for pollutants removed by POTWs, as

discussed in section XIII.E. Dischargers subject to pretreatment standards for new sources are subject only to the removal credit provision (See section XIII.E). New sources subject to NSPS are not eligible for EPA's "fundamentally different factors" variance or any statutory or regulatory modifications. (See *duPont v. Train*, *supra*.)

#### C. Relationship to NPDES Permits and Monitoring Requirements

The BAT and NSPS limitations in today's proposed rule would be applied to individual pesticide plants through NPDES permits issued by EPA or approved State agencies under section 402 of the Act. The preceding section of this preamble discussed the binding effect of this regulation on NPDES permits, except when variances and modifications are expressly authorized. This section adds more detail on the relation between this regulation and NPDES permits.

One issue is how this regulation will affect the powers of NPDES permit-issuing authorities. EPA has developed the limitations and standards in the proposed rule to cover the typical facility for this point source category. In specific cases, the NPDES permitting authority may have to establish permit limits on toxic pollutants that are not covered by this regulation. This regulation does not restrict the power of any permitting authority to act in any manner consistent with law or these or any other EPA regulations, guideline, or policy. For example, if this regulation does not control a particular pollutant, the permit issuer may still limit such pollutants on a case-by-case basis, as appropriate under the Act. In addition, if State water quality standards or other provisions of State or Federal Law require limits on pollutants not covered by this regulation (or require more stringent limits on covered pollutants), the permit issuing authority must apply those limitations.

Another topic of concern is the operation of EPA's NPDES enforcement program, which was an important consideration in developing today's proposal. The Agency emphasizes that although the Clean Water Act is a strict liability statute, EPA can initiate enforcement proceedings at its discretion. EPA has exercised and intends to exercise that discretion in a manner that recognizes and promotes good faith compliance.

#### D. Best Management Practices

Section 304(e) of the Act authorizes the Administrator to prescribe "best management practices" (BMPs). EPA may develop BMPs that apply to all

industrial sites or to a designated industrial category, and may offer guidance to permit authorities in establishing management practices required by unique circumstances at a given plant. The use of dikes, curbs, and other control measures are being used at some PAI manufacturing facilities to contain leaks and spills as part of good "housekeeping" practices. The Agency sees no need to propose any general BMPs at this time, but solicits comments on whether to propose BMPs and why.

#### E. Analytical Methods

Section 304(h) of the Act directs EPA to promulgate guidelines establishing test methods for the analysis of pollutants. These methods are used to determine the presence and concentration of pollutants in wastewater, and are used for compliance monitoring and for filing applications for the NPDES program under 40 CFR 122.41(j)(4) and 122.21(g)(7), and for the pretreatment program under 40 CFR 403.7(d). To date, EPA has promulgated methods for conventional pollutants, toxic pollutants, and for some nonconventional pollutants. The five conventional pollutants are defined at 40 CFR 401.16. Table I-B at 40 CFR 136 lists the analytical methods approved for these pollutants. The 65 toxic metals and organic pollutants are defined at 40 CFR 401.15. The list of 65 toxic pollutants was expanded to a list of 126 "Priority Pollutants." This list of Priority Pollutants is shown, for example, at 40 CFR part 423, appendix A. The list includes non-pesticide toxic organic pollutants, toxic metal pollutants, cyanide, asbestos, and toxic pesticide pollutants (including 3 of the 122 PAIs proposed for regulation today). Currently approved methods for metals and cyanide are included in the table of approved inorganic test procedures at 40 CFR 136.3, Table I-B. Table I-C at 40 CFR 136.3 lists approved methods for measurement of non-pesticide organic pollutants, and Table I-D lists approved methods for the toxic pesticide pollutants and for other pesticide pollutants.

Many of the currently approved promulgated methods for PAIs do not include the most recent advances in technology, particularly the clean up procedures necessary to eliminate interferences and improve reliability, nor do they account for the latest and most sensitive detection devices, which permit accurate detection of PAI pollutants at very low concentrations.

This latest technology is used by many companies to monitor



wastewaters, and was used by EPA in its sampling of pesticide manufacturing industry wastewaters. All of the PAI pollutant data EPA is relying on for the proposed effluent limitations used analytical methods employing the latest in analytical technology. EPA is today proposing that compliance monitoring of effluent from the manufacture of the 122 PAIs proposed for regulation must employ methods listed in Table 7.

**1. Table 7 List of Methods.** The Table 7 list of methods is inclusive of all methods that pesticide manufacturers will be permitted to use; that is, it contains methods already promulgated by EPA in 40 CFR part 136, updated to new versions where appropriate, as well as analytical methods not contained in part 136. The proposed regulatory language makes it clear that pesticides manufacturers will be required to use only methods in Table 7 and will not be permitted to use methods contained in part 136 (except to the extent they are identical to the methods in Table 7). At a later date, EPA may decide to promulgate the methods contained in Table 7 as allowable methods under part 136.

**2. Methods for PAI Pollutants.** EPA has not previously promulgated methods for most of the PAI pollutants in today's proposed rule. In 1985, as part of the promulgation of effluent limitations guidelines and standards for the Pesticide Industry, EPA promulgated methods for 61 PAIs (50 FR 40672, October 4, 1985). These methods were contained in a methods compendium titled "Methods for Nonconventional Pesticides Chemicals Analysis—Municipal and Industrial Wastewater", EPA 440/1-83/079-C. This document is presently out of print and unavailable except in photocopy form. The methods were also published in their entirety in the October 4, 1985, *Federal Register*. The promulgated methods were withdrawn as a part of the withdrawal of the 1985 proposed rule to allow for further testing and possible revision.

Since 1986, EPA has conducted additional methods development for PAI pollutants to incorporate the most recent advances in technology, particularly the clean up procedures necessary to eliminate interferences and improve reliability, and to account for the latest and most sensitive detection devices, which permit accurate detection of PAI pollutants at very low concentrations. In addition, EPA requested and received new analytical methods from pesticide manufacturing facilities which monitor their wastewater. EPA is today proposing that all of these methods be available for compliance monitoring of

effluent from the manufacture of the 122 PAIs proposed for regulation; for many PAIs, more than one analytical method is being proposed. The availability of more than one method for a specific PAI allows flexibility to the analyst to select the analytical method that provides the most accurate results; proposal of alternative methods also allows commenters to provide comparative data which may lead to further improvements in methods or to rejection of some of the proposed methods where data demonstrates that the proposed method is inadequate.

The analytical methods proposed today are listed in Table 7. This list also references several documents containing the complete methods. All the documents containing the methods are available in the docket for this rulemaking. EPA will send a copy of these proposed methods to any interested person who requests a copy in writing. The request should be sent to the address specified at the front of this notice. The documents may also be obtained as follows:

Document title	Source
"Methods for the Determination of Nonconventional Pesticides in Municipal and Industrial Wastewater".	EPA Sample Control Center, 300 N. Lee Street, Alexandria, VA 22314.
"Methods for the Determination of Organic Compounds in Drinking Water" (EPA/600/4-89/039), revised July 1991.	NTIS*, 5285 Port Royal Road, Springfield, VA 22162, order #PB91-231480.
"Methods for the Determination of Organic Compounds in Drinking Water—Supplement I" (EPA/600/4-90/020).	NTIS*, 5285 Port Royal Road, Springfield, VA 22162, order #PB91-146027.
"Methods for the Determination of Metals in Environmental Samples (EPA/600/4-91/010).	NTIS*, 5285 Port Royal Road, Springfield, VA 22162, order #PB91-231498.

\*NTIS: National Technical Information Service.

These documents include methods for the 122 PAIs proposed for regulation today as well as other PAIs. A number of PAIs which are not manufactured in the United States are incorporated into products that are formulated in the United States. The Agency is continuing its evaluation of these methods, and developing new methods, for potential use in monitoring discharges from pesticide formulating/packaging (PFP) plants. EPA intends to propose effluent guidelines for the PFP industrial category in January, 1994.

EPA is proposing to approve these analytical methods so that all pesticide methods for water and wastewater developed by EPA to date will be available for use by industry and by laboratories that test for these

pesticides, and in anticipation of EPA's future rulemaking for Pesticides Formulators and Packagers. However, merely because EPA is proposing approval for a given PAI in a given method, it should not be construed that EPA definitely will regulate (or not regulate) that PAI.

Most PAIs are manufactured at only one or a few plants. In collecting analytical data for today's rule, EPA applied a given method to the wastewater from the specific plant at which the PAI was manufactured. Therefore, most of these methods were tested on the actual wastewater to which EPA expects them to be applied.

**3. Methods Required for Monitoring.** Today's proposed analytical methods will be used by pesticide manufacturers, by regulatory agencies including POTWs, by commercial testing laboratories, and by others, to determine compliance with the proposed effluent limitations guidelines and standards. The methods proposed for monitoring the PAIs proposed for regulation in today's notice are listed in Table 7. There is at least one method for each PAI, at least two methods for most PAIs, and three methods for many PAIs. EPA's intent in proposing multiple methods is to permit as much flexibility as possible while controlling the quality of the methods approved. In addition to flexibility in method selection, a certain amount of flexibility within each method is permitted. This flexibility was detailed in the preamble to 40 CFR part 136 wastewater methods (49 FR 43234, October 26, 1984) and allows modification of the method to overcome interference problems. These alternate procedures and techniques may be employed provided that the quality control (QC) criteria within the method are all met.

## XX. Solicitation of Data and Comments

EPA invites and encourages public participation in this rulemaking. The Agency asks that comments address any perceived deficiencies in the record of this proposal and that suggested revisions or corrections be supported by data.

EPA particularly requests information on the following issues:

1. EPA has obtained from the industry a substantial data base for the control and treatment technologies which serve as the basis for the proposed regulations. Plants which have not submitted data or which have compiled more recent data are requested to forward these to EPA. The data should be individual data points, not averages or summary data, including flow,



production, and all pollutant parameters for which analyses were run.

2. EPA is today proposing analytical methods for a large number of PAIs. Most of these methods have been tested in pesticide manufacturing process wastewater. The methods are also available for use in analysis of other wastewaters which may contain pesticides, particularly for pesticide formulating/packaging process wastewater. EPA requests data and comments on all of the analytical methods proposed, particularly data and comments on the applicability of the methods to pesticide formulating/packaging process wastewater.

3. EPA has developed BAT limitations primarily on the basis of performance data from facilities in place. EPA solicits comments on the costs and/or effectiveness of any alternative combination of treatment that may also remove active ingredients from wastewater, e.g., removal of a technology from a treatment train, or changes in retention time for technologies such as hydrolysis or carbon adsorption. EPA may use such comments to make alternative BAT determinations that might lower the cost of achieving pollutant removal benefits.

4. Are you aware of any economically achievable source reduction practices that could result in reduced wastes, emissions or releases to all environmental media (water, air or land)? Source reduction, as defined by the Pollution Prevention Act of 1990, reduces the generation and release of hazardous substances, pollutants, wastes, release or residuals at the source, usually within a process. The term includes equipment or technology modification, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control. The term "source reduction" does not include any practice which alters the physical, chemical, or biological characteristics or the volume of a substance, pollutant, or contaminant through a process or activity which itself is not integral to and necessary for the production of a product or the providing of a service. For example, are there families of pesticides (such as chlorinated hydrocarbons, urethanes, phosphate esters, etc.) which have enough common characteristics to make source reduction technology transfer possible? Are there opportunities to reduce the use of solvents as carriers during the synthesis of the pesticides? Can greater use of continuous processes instead of batch

processes lead to more source reduction? Are there improvements that can be made to batch processes (e.g., better scheduling or modified cleaning practices) that promote source reduction? Please do not limit your answers to the listed examples. For each possible source reduction option, please provide information such as:

- The nature of the process or practice;
- Wastes, emissions, or releases affected;
- Changes in volume, toxicity, or concentration of the wastes, emissions, and releases after accounting for changes in production and for factors other than production that may affect waste, emission, or release;
- Impacts on releases to all media (i.e., transfers from one medium to another);
- Impacts on energy and water use;
- Stage of development of pilot source reduction technique;
- Costs associated with the activity, including upfront investment operation/maintenance costs of the source reduction practices.

Please discuss whether these processes could be adapted to other pesticide manufacturing operations.

5. EPA solicits comments on alternative methods for the calculation of limitations where actual performance data is not available (see Section XI).

6. EPA solicits comments on the approach for setting priority pollutant limitations as explained in Section XI but only with respect to its appropriateness for the pesticides manufacturers rulemaking. The comment period on any of the issues discussed in Section XI is not being reopened with respect to the OCPSF rulemaking.

7. EPA requests comment on whether it should allow a full three years for compliance with PSES, or whether a shorter time is appropriate where plants are already subject to PSES standards from the OCPSF industrial category.

8. EPA requests comment on the proposal to make the existing BPT limitations applicable to ametryn, prometon, prometryn, terbutryn, cyanazine, atrazine, propazine, simazine, terbuthylazine, glyphosate, phenylphenol, hexazinone, sodium phenylphenate, biphenyl, methoprene, and organo-tin pesticides.

9. EPA solicits comments on the approach to establishing NSPS limitations. Is the methodology EPA has chosen to establish a 28% wastewater flow reduction for certain PAIs appropriate? Is a 28% reduction in wastewater flow economically

achievable for new manufacturing plants for the affected PAIs?

10. EPA is requiring in-plant limitations and monitoring of certain PAIs which, when combined with other process wastewaters, would occur at the end-of-pipe at levels below the current analytical limits of detection. EPA has traditionally set technology-based performance standards at end-of-pipe, providing facilities flexibility to meet these standards. Setting in-plant limitations may reduce this desirable flexibility. Is setting in-plant limitations appropriate where methods of analytical detection make it difficult to determine compliance with stringent end-of-pipe performance standards? Is the technology required to meet in-plant limitations economically achievable and applicable across facilities affected? Would in-plant limitations interfere with any facility's current work plan process to remove PAIs to acceptable levels before final discharge? Has EPA set in-plant limitations at the appropriate stage of PAI treatment and does setting these in-plant limitations unnecessarily constrain the plant's opportunity to centrally and cost-effectively treat the plant's total effluent? Are there any alternative ways to set effluent limitations for these PAIs that cannot be accurately detected when combined with other, non-pesticide process wastewaters? For example, should EPA set an end-of-pipe effluent limitation at the analytical limit of detection at the same time allowing facilities to demonstrate compliance through in-plant monitoring?

EPA also requests data and comments on suggested new analytical methods for monitoring any PAI, including those for which no limitations or analytical methods are proposed today.

#### List of Subjects in 40 CFR Part 455

Pesticide chemicals manufacturing, Water pollution control, Water treatment and disposal.

Dated: March 31, 1992.

William K. Reilly,  
Administrator.

#### Appendix A—Abbreviations, Acronyms, and Other Terms Used in This Notice

Act—The Clean Water Act  
Agency—U.S. Environmental Protection Agency.

BAT—The best available technology economically achievable, applicable to effluent limitations to be achieved by July 1, 1984, for industrial discharges to surface waters, as defined by sec. 304(b)(2)(B) of the Act.

BCT—The best conventional pollutant control technology, applicable to discharges of conventional pollutants from existing



industrial point sources, as defined by sec. 304(b)(4) of the Act.

**BMP**—Best management practices, as defined by sec. 304(e) of the Act.

**BPT**—The best practicable control technology currently available, applicable to effluent limitations to be achieved by July 1, 1977, for industrial discharges to surface waters, as defined by sec. 304(b)(1) of the Act.

**Clean Water Act**—The Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1251 et seq.), as amended by the Clean Water Act of 1977 (Pub. L. 95-217), and the Water Quality Act of 1987 (Pub. L. 100-4).

**Conventional Pollutants**—Constituents of wastewater as determined by sec. 304(a)(4) of the Act, including, but not limited to, pollutants classified as biochemical oxygen demand, suspended solids, oil and grease, fecal coliform, and pH.

**Direct Discharger**—An industrial discharger that introduces wastewater to a receiving body of water with or without treatment by the discharger.

**Effluent Limitation**—A maximum amount, per unit of time, production or other unit, of each specific constituent of the effluent that is subject to limitation from an existing point source. Allowed pollutant discharge may be expressed as a mass loading in pound per 1,000 pound PAI produced or as a concentration in milligrams per liter.

**End-of-Pipe Treatment (EOP)**—Refers to those processes that treat a plant waste stream for pollutant removal prior to discharge. EOP technologies covered are classified as primary (physical separation processes), secondary (biological processes), and tertiary (treatment following secondary) processes. Different combinations of these treatment technologies may be used depending on the nature of the pollutants to be removed and the degree of removal required.

**Indirect Discharger**—An industrial discharger that introduces wastewater into a publicly-owned treatment works.

**In-Plant Control or Treatment Technologies**—Controls or measures applied within the manufacturing process to reduce or eliminate pollutant and hydraulic loadings of raw wastewater. Typical in-plant control measures include process modification, instrumentation, recovery of raw materials, solvents, products or by-products, and water recycle.

**Nonconventional Pollutants**—Parameters selected for use in developing effluent limitation guidelines and new source performance standards which have not been previously designated as either conventional pollutants or priority pollutants.

**Non-Water Environmental Quality Impact**—Deleterious aspects of control and treatment technologies applicable to point source category wastes, including, but not limited to air pollution, noise, radiation, sludge and solid waste generation, and energy used.

**NPDES**—National Pollutant Discharge Elimination System, a Federal program requiring industry and municipalities to obtain permits to discharge pollutants to the nation's waters, under sec. 402 of the Act.

**NSPS**—New source performance standards, applicable to industrial facilities

whose construction is begun after the publication of the proposed regulations, as defined by sec. 306 of the Act.

**OCPSF**—Organic chemicals, plastics, and synthetic fibers manufacturing point source category.

**Point Source Category**—A collection of industrial sources with similar function or product, established by sec. 306(b)(1)(A) of the Federal Water Pollution Control Act, as amended for the purpose of establishing Federal standards for the disposal of wastewater.

**POTW**—Publicly-owned treatment works. Facilities that collect, treat, or otherwise dispose of wastewaters, owned and operated by a village, town, county, authority or other public agency.

**Pretreatment Standard**—Industrial wastewater effluent quality required for discharge to a publicly-owned treatment works.

**Priority Pollutants**—The toxic pollutants listed in 40 CFR part 423, appendix A.

**PSES**—Pretreatment Standards for existing sources of indirect discharges, under sec. 307(b) of the Act.

**PSNS**—Pretreatment standards for new sources of indirect discharges under sec. 307(b) and (c) of the Act.

**SIC**—Standard Industrial Classification, a numerical categorization scheme used by the U.S. Department of Commerce to denote segments of industry.

**Technical Development Document**—Development Document for Proposed Effluent Limitations Guidelines and Standards for the Pesticides Chemicals Manufacturing Point Source Category.

## Appendix B—Priority Pollutants for Which Limitations Are Being Transferred From the Organic Chemicals, Plastics and Synthetic Fibers Effluent Guidelines and Standards (40 CFR part 414)

Pollutant No.	Pollutant name
004	Benzene.
006	Tetrachloromethane.
007	Chlorobenzene.
010	1,2-Dichloroethane.
011	1,1,1-Trichloroethane.
023	Trichloromethane.
024	2-chlorophenol.
025	1,2-Dichlorobenzene.
027	1,4-Dichlorobenzene.
029	1,1-Dichloroethylene.
030	1,2-trans-Dichloroethylene.
031	2,4-Dichlorophenol.
032	1,2-Dichloropropane.
033	1,3-Dichloropropane.
034	2,4-Dimethylphenol.
038	Ethylbenzene.
044	Dichloromethane.
045	Chloromethane.
055	Naphthalene.
065	Phenol.
085	Tetrachloroethylene.
086	Toluene.
122	Lead (Total).

## Appendix C—Toxic Pollutants Excluded From Regulation

1. EPA proposes to exclude certain toxic pollutants from regulation for one or all of the following reasons:

a. The pollutant is not detectable in the effluent with the use of analytical methods promulgated to sec. 304(h) of the Act or other state-of-the-art methods.

Acrylonitrile	Chlordane
1,1,2-Trichloroethane	4,4'-DDT
2-Chloroethyl vinyl ether	4,4'-DDE
3,3'-Dichlorobenzidine	4,4'-DDD
2,6-Dinitrotoluene	$\alpha$ -Endosulfan
4,6-Dinitro-o-cresol	$\beta$ -Endosulfan
Bis (2-Chloroisopropyl) ether	Endosulfan sulfate
Bis (2-Chloroethoxy) methane	$\alpha$ -BHC
N-Nitrosodimethylamine	$\beta$ -BHC
N-Nitrosodimethylamine	$\gamma$ -BHC
Pentachlorophenol	$\delta$ -BHC
Butyl benzyl phthalate	PCB-1242
Acenaphthene	PCB-1254
Benzo (A) pyrene	PCB-1221
Benzo (GHI) perylene	PCB-1232
Dimethyl phthalate	PCB-1248
Dibenzo (A,H) anthracene	PCB-1260
Ideno (1,2,3-CD) pyrene	PCB-1016
Aldrin	2,3,7,8-Tetrachlorodibenzo-p-dioxin

Dieldrin

b. The pollutant is present only in trace amounts and is neither causing nor likely to cause toxic effects. In addition, the pollutant is present in amounts too small to be effectively reduced by technologies known to the Administrator.

2-Chloronaphthalene	Cadmium
1,3-Dichlorobenzene	Chromium
2,4-Dinitrotoluene	Copper
1,2-Diphenylhydrazine	Mercury
Bis (2-ethylhexyl) phthalate	Nickel
Di-n-butyl phthalate	Selenium
Diethyl phthalate	Silver
Antimony	Thallium
Arsenic	Zinc
Beryllium	1,1-Dichloroethane

c. The pollutant is detectable in the effluent from only a small number of sources and the pollutant is uniquely related to only those sources.

Acenaphthene	Nitrobenzene
Acrolein	2-Nitrophenol
Benzenide	2,4-Dinitrophenol
1,2,4-Trichlorobenzene	Di-n-octyl Phthalate
Hexachlorobenzene	Benzo (A) anthracene
1,1,2,2-Tetrachloroethane	Benzo fluoranthene
Chloroethane	Benzo (B) fluoranthene
Bis (2-Chloroethyl) ether	Chrysene
Parachlorometacresol	Anthracene
Fluoranthene	Fluorene
4-Chlorophenyl phenyl ether	Phenanthrene
4-Bromophenyl phenyl ether	Pyrene
Isophorone	Vinyl chloride

d. The pollutant will be effectively controlled by the technologies which are the basis for controlling certain pesticide active ingredients in today's proposed effluent limitations guidelines and standards.

Hexachloroethane

N-Nitrosodi-n-propylamine

Endrin aldehyde

Heptachlor epoxide

1,1,2-Trichloroethylene



## 2,4,6-Trichlorophenol

2. In addition, EPA proposes not to regulate certain priority pollutants for one or all of the following reasons:

a. EPA is not regulating the following priority pollutants due to lack of treatability data. These priority pollutants were not detected during sampling but would be expected in wastewaters from the manufacture of certain pesticides. However, those pesticides were not in production when sampling activities were scheduled by EPA.

Hexachlorobutadiene  
Hexachlorocyclopentadiene  
4-Nitrophenol

b. EPA is also not regulating Asbestos because there is no promulgated sec. 304(h) analytical method for that pollutant in water.

For the reasons set forth in the preamble, 40 CFR part 455 is proposed to be amended as follows:

## PART 455—PESTICIDE CHEMICALS

1-2. The authority citation for part 455 is revised to read as follows:

Authority: Secs. 301, 304, 306, 307, and 501, Pub. L. 92-500, 86 Stat. 816, Pub. L. 95-217, 91 Stat. 156, and Pub. L. 100-4 (33 U.S.C. 1311, 1314, 1316, 1317, and 1361).

3. Section 455.10 is amended by adding paragraph (f) to read as follows:

## § 455.10 General definitions.

(f) *Priority Pollutants* means the toxic pollutants listed in 40 CFR part 423 appendix A.

4. A new § 455.11 is added immediately following § 455.10 to read as follows:

## § 455.11 Compliance date for Pretreatment Standards for Existing Sources (PSES).

All discharges subject to pretreatment standards for existing sources (PSES) in this part must comply with the standards no later than *[insert date three years after the effective date of this regulation]*.

## Subpart A—[Amended]

5. Section 455.20 is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

## § 455.20 Applicability; description of the organic pesticide chemicals manufacturing subcategory.

(a) For the purpose of calculating effluent limitations for COD, BOD<sub>5</sub>, and TSS, the provisions of this subpart are applicable to discharges resulting from the manufacture of organic pesticide

active ingredients and organo-tin pesticide active ingredients, excluding the following: Allethrin; Benzyl Benzoate; Bisethylxanthogen; Chlorophacinone; Coumafuryl; Dimethyl Phthalate; Diphacinone; Endothall Acid; EXD (Herbisan); Gibberellic Acid; Naphthalene Acetic Acid; Propargite; 1,8 Naphthalic Anhydride; Quinmethionate; Rotenone; Sulfoxide; and Warfarin and similar anticoagulants.

(d) A plant that manufactures a pesticide active ingredient listed in table 1 must comply with the BAT effluent limitations and new source performance and pretreatment standards for that pesticide active ingredient listed in table 2 (BAT and PSES) or table 3 (NSPS and PSNS). A plant that manufactures a pesticide active ingredient listed in table 1 must also comply with the BAT effluent limitations and new source performance and pretreatment standards for priority pollutants listed in tables 4, 5 and 6. The limitations in table 4 (BAT and NSPS) are applicable to existing and new direct discharge point sources that use End-of-Pipe biological treatment. The limitations in table 5 (BAT and NSPS) are applicable to existing and new direct discharge point sources that do not use End-of-Pipe biological treatment. The limitations in table 6 (PSES and PSNS) are applicable to existing and new sources that discharge to Publicly Owned Treatment Works. In the case of lead and total cyanide, the discharge quantity (mass) shall be determined by multiplying the concentrations listed in the applicable tables in this part times the flow from metal-bearing waste streams for lead and times the flow from cyanide-bearing waste streams for total cyanide.

6. New §§ 455.23, 455.24, 455.25, 455.26 and 455.27 are added to subpart A to read as follows:

## § 455.23 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT).

Except as provided in 40 CFR 125.30-32, any existing point source subject to this subpart must achieve the effluent limitations representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology: the limitations for BOD, TSS and pH are the same as those specified in 40 CFR 455.22.

## BCT EFFLUENT LIMITATIONS

Pollutant or pollutant property	Effluent limitations	
	Maximum for any 1 day	Average of daily values shall not exceed <sup>2</sup>
BOD <sub>5</sub> .....	7.400	1.6000
TSS.....	6.100	1.8000
pH.....	( <sup>1</sup> )	( <sup>1</sup> )

<sup>1</sup> Within the range 6.0 to 9.0

<sup>2</sup> Metric units: Kilogram/1,000 kg of total organic active ingredients. English units: Pound/1,000 lb of total organic active ingredients.

## § 455.24 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available control technology economically achievable (BAT).

Except as provided in 40 CFR 125.30-32, any existing point source subject to this subpart must achieve the effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology as specified in 40 CFR 455.20(d). For the priority pollutants, the permit writer must set mass-based limitations by multiplying the plant's process wastewater flow subject to the pesticides regulation by the concentration-based effluent limitations guidelines.

## § 455.25 New source performance standards (NSPS).

Any new source subject to this subpart which discharges process wastewater pollutants must achieve the new source performance standards specified in 40 CFR 455.20(d), and the following standards for BOD, TSS, COD and pH:

## NSPS EFFLUENT LIMITATIONS

Pollutant or pollutant property	Effluent limitations	
	Maximum for any 1 day	Average of daily values shall not exceed <sup>2</sup>
COD.....	9.360	6.480
BOD <sub>5</sub> .....	5.328	1.1520
TSS.....	4.392	1.2960
pH.....	( <sup>1</sup> )	( <sup>1</sup> )

<sup>1</sup> Within the range 6.0 to 9.0.

<sup>2</sup> Metric units: Kilogram/1,000 kg of total active ingredients. English units: Pound/1,000 lb of total organic active ingredients.

For the priority pollutants, the permit writer must set mass-based limitations by multiplying the plant's process wastewater flow subject to the pesticides regulation by the concentration-based effluent limitations guidelines.



#### § 455.26 Pretreatment standards for existing sources (PSES).

Except as provided in 40 CFR 403.7, any existing source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR part 403 and achieve the pretreatment standards for existing sources (PSES) as specified in 40 CFR 455.20(d). For the priority pollutants, such sources must achieve discharges not exceeding the quantity (mass) determined by multiplying the process wastewater flow subject to this Subpart times the concentration listed in table 6 of this part for existing facilities.

#### § 455.27 Pretreatment standards for new sources (PSNS).

Except as provided in 40 CFR 403.7, any new source subject to this subpart which introduces pollutants into a publicly owned treatment works must comply with 40 CFR part 403 and achieve the pretreatment standards for new sources (PSNS) as specified in 40 CFR 455.20(d). For the priority pollutants, such sources must achieve discharges not exceeding the quantity (mass) determined by multiplying the

process wastewater flow subject to this Subpart times the concentration listed in Table 6 of this Part for new facilities.

#### Subpart B—[Amended]

7. Subpart B is amended by adding and reserving new §§ 455.33, 455.34, 455.35, 455.36 and 455.37 to read as follows:

§ 455.33 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best conventional pollutant control technology (BCT). [Reserved]

§ 455.34 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available control technology economically achievable (BAT). [Reserved]

§ 455.35 New source performance standards (NSPS). [Reserved]

§ 455.36 Pretreatment standards for existing sources (PSES). [Reserved]

§ 455.37 Pretreatment standards for new sources (PSNS). [Reserved]

8. A new subpart D is added to read as follows:

#### Subpart D—Test Methods for Pesticide Pollutants

##### § 455.50 Identification of test procedures.

The pesticide active ingredients to which the regulation applies and for which effluent limitations guidelines and standards are specified in this Part are named, together with the Chemical Abstracts Service (CAS) number (provided to assist in identifying the pesticide active ingredient only) and analytical method(s) designation(s) in Table 7. The discharge parameter values required under the Clean Water Act must be determined by one of the analytical methods cited and described in Table 7 except as provided in 40 CFR 136.5. Pesticides manufacturers may not use the analytical methods cited in table 1B, table 1C, or table 1D of 40 CFR part 136 to make these determinations (except where the method cited in those Tables is identical to the method specified in table 7 of this part).

9. Part 455 is amended by adding Tables 1 through 7 to read as follows:

TABLE 1.—LIST OF PESTICIDE ACTIVE INGREDIENTS

EPA census code	Pesticide code	Pesticide name	CAS No.
1	10501	Dicofol [1,1-Bis(chlorophenyl)-2,2,2-trichloroethanol]	00115-32-2
2	51501	Maleic Hydrazide	00123-33-1
3	42002	EDB [1,2-Ethylene dibromide]	00106-93-4
4	82901	Vandice TH [1,3,5-Triethylhexahydro-s-triazine]	07779-27-3
5	29001	Dichloropropene	00542-75-6
6	12601	Phenarsazine Oxide	00058-36-6
6	12602	10,10'-Oxybisphenoxarsine	04095-45-8
7	17901	Dowicil 75 [1-(3-Chloroallyl)-3,5,7-triaza-1-azoniaadamantanechloride]	04080-31-3
8	109901	Triadimefon	43121-43-3
9	44901	Hexachlorophene (nabac)	00070-30-4
10	55004	Tetrachlorophene	01940-43-8
11	55001	Dichlorophene	00097-23-4
12	84001	Dichlorvos	00062-73-7
13	102401	Landrin-2 [2,3,5-trimethylphenylmethylcarbamate]	02686-99-9
14	82601	Fenac [2,3,6-Trichlorophenylacetic acid]	00085-34-7
14	(1)	Fenac Salts and Esters	(1)
15	82001	2,4,5-T [2,4,5-Trichlorophenoxyacetic acid]	00093-76-5
15	(1)	2,4,5-T Salts and Esters	(1)
16	30001	2,4-D [2,4-Dichlorophenoxyacetic acid]	00084-75-7
16	(1)	2,4-D Salts and Esters	(1)
17	30801	2,4-DB [2,4-Dichlorophenoxybutyric acid]	00094-82-6
17	(1)	2,4-DB Salts and Esters	(1)
18	80811	Anilazine [2,4-Dichloro-6-(o-chloroanilino)-s-triazine]	00101-05-3
19	36001	Dinocap	39300-45-3
20	31301	Dichloran [2,6-dichloro-4-nitroaniline]	00099-30-9
21	8707	Busan 90 [2-Bromo-4-hydroxyacetophenone]	02491-38-5
22	15801	Mevinphos	07786-34-7
23	39001	Sulfallate [2-chloroallyldiethylthiocarbamate]	00095-06-7
24	84101	Chlorfenvinphos	00470-90-6
25	10010	Cyanazine	21725-46-2
26	19101	Propachlor	01918-16-7
27	30501	MCPA [2-Methyl-4-chlorophenoxyacetic acid]	00094-74-6
27	(1)	MCPA Salts and Esters	(1)
28	99901	Octhilinone	26530-20-1
29	67703	Pindone	00083-26-1
30	31401	Dichlorprop [2-(2,4-Dichlorophenoxy) propionic acid]	00120-36-5
30	(1)	Dichlorprop Salts and Esters	(1)
31	31501	MCPP [2-(2-Methyl-4-chlorophenoxy)propionic acid]	00093-65-2
31	(1)	MCPP Salts and Esters	(1)
32	60101	Thiabendazole	00148-79-8



TABLE 1.—LIST OF PESTICIDE ACTIVE INGREDIENTS—Continued

EPA census code	Pesticide code	Pesticide name	CAS No.
33	80815	Belclore 310 [2-(methylthio)-4-(ethylamino)-6-(1,2-dimethylamino)-s-triazine]	22936-75-0
34	21201	Cloprop [2-(m-Chlorophenoxy)propionic acid]	00101-10-0
34	(u)	Cloprop Salts and Esters	(u)
35	35603	TCMTB [2-(Thiocyanomethylthio)benzothiazole]	21564-17-0
36	99001	HAE [2-((Hydroxymethyl)amino) ethanol]	34375-28-5
37	6770	Chlorophacinone	03691-35-8
38	102401	Landrin-1 [3,4,5-trimethylphenylmethylcarbamate]	02686-99-9
39	101701	Pronamide	23950-58-5
40	100501	Methiocarb	02032-65-7
41	28201	Propanil	00709-98-8
42	107801	Polyphase antimildew [3-Iodo-2-propynyl butylcarbamate]	55406-53-6
43	86001	3-(a-Acetonylfurfuryl)-4-hydroxycoumarin [Coumafuryl]	00117-52-2
43	(u)	Conmafuryl Salts and Esters	(u)
44	37507	DNOC (4,6-dinitro-o-cresol)	00534-52-1
45	101101	Metribuzin	21087-64-9
46	19401	CPA (4-chlorophenoxyacetic acid)	00122-88-3
46	(u)	CPA Salts and Esters	(u)
47	19201	MCPB [4-(2-Methyl-4-chlorophenoxy)butyric acid]	00094-81-5
47	(u)	MCPB Salts and Esters	(u)
48	44401	Aminocarb [4-(dimethylamino)-m-tolylmethylcarbamate]	02032-59-9
49	84701	Etridiazole	02593-15-9
50	55501	Ethoxyquin	00091-53-2
51	59804	Quinoliol sulfate (8-Quinoliol sulfate)	00134-31-6
52	103301	Acephate	30560-19-1
53	114401	Acifluorfen	50594-66-6
53	114402	Acifluorfen Salts and Esters	62476-59-9
54	90501	Alachlor	15972-60-8
55	98301	Aldicarb	00116-06-3
56	69105	Hyamine 3500 [Alkyl dimethyl benzyl ammonium chloride *(50% C14, 40% C12, 10% C16)]	68424-85-1
57	4001	Allethrin (all isomers and allethrin coil)	00584-79-2
58	80801	Ametryn	00834-12-8
59	106201	Amitraz	33089-61-1
60	80803	Atrazine	01912-24-9
61	105201	Bendiocarb	22781-23-3
62	99101	Benomyl	17804-35-2
63	8901	Benzene Hexachloride	00608-73-1
64	9501	Benzyl benzoate	00120-51-4
65	10101	Lethane 384 [Beta-Thiocyanoethyl esters of mixed fatty acids containing from 10-18 carbons]	00301-11-1
66	104301	Bifenox	42576-02-3
67	17002	Biphenyl	00092-52-4
68	12301	Bromacil	00314-40-9
68	12302	Bromacil, lithium	53404-19-6
69	35301	Bromoxynil	01689-84-5
69	35302	Bromoxynil octanoate	01689-99-2
70	112301	Butachlor	23184-66-9
71	101401	Giv-gard [ $\beta$ -Bromo- $\beta$ -nitrostyrene]	07166-19-0
72	12501	Cacodylic acid [Dimethylarsenic acid]	00075-60-5
72	(u)	Cacodylic acid Salts and Esters	(u)
73	81701	Captan	02425-6-1
74	81301	Captan	00133-06-2
75	56801	Carbaryl [Sevin]	00063-25-2
76	90601	Carbofuran	01563-66-2
77	90602	Carbosulfan	55285-14-8
78	29901	Chloramben	00133-90-4
78	(u)	Chloramben Salts and Esters	(u)
79	58201	Chlordane	00057-74-9
80	27301	Chloroneb	02675-77-6
81	81501	Chloropicrin	00076-06-2
82	81901	Chlorothalonil	01897-45-6
83	25501	Chloroxuron	01982-47-4
84	83701	Stirofos	00961-11-5
85	59102	Chlorpyrifos methyl	05598-13-0
86	59101	Chlorpyrifos	02921-88-2
87	14504	Mancozeb	08018-01-7
88	24002	Bioquin [Copper 8-hydroxyquinoline]	10380-28-6
89	39105	Copper EDTA	54453-03-1
90	109301	Fenvalerate	51630-58-1
91	43401	Cycloheximide	00066-81-9
92	28901	Dalapon (2,2-dichloropropionic acid)	00075-99-0
92	(u)	Dalapon Salts and Esters	(u)
93	27501	Dienochlor	02227-17-0
94	57601	Demeton [O,O-Diethyl O-(and S-) (2-ethylthio)ethyl phosphorothioate]	08065-48-3
95	104801	Desmedipham	13684-56-5
96	14502	Diammonium ethylenebis(dithiocarbamate)	03566-10-7
97	11301	DBCP [Dibromo-3-chloropropane]	00096-12-8
98	29801	Dicamba [3,6-Dichloro-o-anisic acid]	01918-009
98	(u)	Dicamba Salts and Esters	(u)
99	29601	Dichlorone (Phygon)	00117-80-6



TABLE 1.—LIST OF PESTICIDE ACTIVE INGREDIENTS—Continued

EPA census code	Pesticide code	Pesticide name	CAS No.
100	103401	Thiophanate ethyl	23564-06-9
101	32101	Perthane [Diethyl diphenyl dichloroethane and related compounds]	00072-56-0
102	86501	EXD [Diethyl dithiobis (thionoformate)]	00502-55-6
103	57801	Diazinon	00333-41-5
104	108201	Disulfobenzuron	35367-38-5
105	69122	Benzethonium chloride	00121-54-0
106	35001	Dimethoate	00060-51-5
107	53501	Parathion methyl	00298-00-0
108	35201	Dicrotophos	00141-66-2
109	58801	Crotoxyphos	07700-17-6
110	78701	DCPA [Dimethyl 2,3,5,6-tetrachloroterephthalate]	01861-32-1
111	57901	Trichlorofon	00052-68-6
112	37505	Dinoseb	00088-85-7
113	37801	Dioxathion	00078-34-2
114	67701	Diphacinone	00082-66-6
115	36601	Diphenamid	00957-51-7
116	38501	Diphenylamine	00122-39-4
117	47201	MGK 326 [Dipropyl isocinchomeronate]	00113-48-4
118	63301	Nabonate [Disodium cyandithioimidocarbonate]	00138-93-2
119	35505	Diuron	00330-54-1
120	44303	Metasol DGH [Dodecylguanidine hydrochloride]	13590-97-1
121	44301	Dodine (dodecylguanidine acetate)	02439-10-3
122	79401	Endosulfan [Hexachlorohexahydromethano-2,4,3-benzodioxathiepin-3-oxide]	00115-29-7
123	38901	Endothall	00145-73-3
123	(1)	Endothall Salts and Esters	(1)
124	41601	Endrin	00072-20-8
125	113101	Ethalfuralin	55283-68-6
126	58401	Ethion	00563-12-2
127	41101	Ethoprop	13194-48-4
128	100601	Fenamiphos	22224-92-6
129	28801	Chlorobenzilate	00510-15-6
130	41405	Butylate	02008-41-5
131	59901	Famphur	00052-85-7
132	206600	Fenarimol	60168-88-9
133	53301	Fenthion	00055-38-9
134	34801	Ferbam	14484-64-1
135	35503	Fluometuron	02164-17-2
136	75002	Fluoroacetamide	00640-19-7
137	81601	Folpet	00133-07-3
138	103601	Glyphosate [N-(Phosphonomethyl) glycine]	01071-83-6
138	(1)	Glyphosate Salts and Esters	(1)
139	103602	Glyphosine	02439-99-8
140	44801	Heptachlor	00076-44-8
141	115601	Cycloprate	54460-46-7
142	107201	Hexazinone	51235-04-2
143	109401	Isofenphos	25311-71-1
144	100201	Isopropalin	33820-53-0
145	47601	Propam	00122-42-9
146	97401	Karbutilate	04849-32-5
147	9001	Lindane	00058-89-9
148	35506	Linuron	00330-55-2
149	30504	Malachite green [Ammonium(4-(p-(dimethylamino)-alpha-phenylbenzylidene)-2,5-cyclonhexadien-1-ylidene)-dimethyl chloride]	00569-64-2
150	57701	Malathion	00121-75-5
151	14505	Maneb	12427-38-2
152	34802	Manganous dimethyldithiocarbamate	15339-36-3
153	114001	Mefluidide [N-(2,4-dimethyl-5-((trifluoromethyl) sulfonyl)-animo) phenyl acetamide]	53780-34-0
153	(1)	Mefluidide Salts and Esters	(1)
154	101201	Methamidophos	10265-92-6
155	100301	Methidathion	00950-37-8
156	90301	Methomyl	16752-77-5
157	105401	Methoprene	40596-69-8
158	34001	Methoxychlor	00072-43-5
159	69134	Methylbenzethonium chloride	15716-02-6
160	53201	Methylbromide	00074-83-9
161	(1)	Methylarsonic acid Salts and Esters	(1)
162	69129	Hyamine 2389 [Methyldodecylbenzyl trimethyl ammonium chloride 80% and methyldodecylxylene bis (trimethylammonium chloride) 20%]	01399-80-0
163	68102	Nalco D-2303 [Methylenebisthiocyanate]	06317-18-6
164	54101	Quinmethionate	02439-01-2
165	108801	Metolachlor	51218-45-2
166	44201	Mexacarbate	00315-18-4
167	14601	Metiram	09006-42-2
168	35502	Monuron TCA	00140-41-0
169	35501	Monuron	00150-68-5
170	103001	Napropamide	15299-99-7
171	80301	Deet	00134-62-3
172	14503	Nabam	00142-59-6
173	34401	Naled	00300-76-5



TABLE 1.—LIST OF PESTICIDE ACTIVE INGREDIENTS—Continued

EPA census code	Pesticide code	Pesticide name	CAS No.
174	35801	Norea	18530-56-8
175	105801	Norflurazon	27314-13-2
176	30701	N-1-Naphthylphthalimide	05333-99-3
176	30702	Naptalam [N-1-Naphthylphthalamic acid]	00132-66-1
176	30703	Naptalam Salts and Esters	00132-67-2
177	57001	MGK 264 [N-2-Ethylhexyl bicycloheptene dicarboximide]	00136-45-8
178	84301	Benfluralin	01861-40-1
179	79501	Sulfotepp	03689-24-5
180	79101	Aspon	03244-90-4
181	36501	Coumaphos	00056-72-4
182	32701	Fensulfothion	00115-90-2
183	32501	Disulfoton	00298-04-4
184	105901	Fenitrothion	00122-14-5
185	59201	Phosmet	00732-11-6
186	58001	Azinphos Methyl	00086-50-0
187	58702	Oxydemeton methyl	00301-12-2
188	(1)	Organo-arsenic pesticides (not otherwise listed)	(1)
189	(1)	Organo-cadmium pesticides	(1)
190	(1)	Organo-copper pesticides	(1)
191	(1)	Organo-mercury pesticides	(1)
192	(1)	Organo-tin pesticides	(1)
193	59401	ortho Dichlorobenzene *	(1)
194	104201	Oryzalin	00095-50-1
195	103801	Oxamyl	19041-88-3
196	111601	Oxyfluorfen	23135-22-0
197	111501	Bolstar [Sulprofos]	42874-03-3
198	219900	Sulprofos Oxon	35400-43-2
199	41801	Santox (O-Ethyl O-(p-nitrophenyl) phenylphosphonothioate	38527-90-1
200	41701	Fonofos	02104-64-5
201	47802	Propoxur (o-Isopropylphenylmethylcarbamate)	00944-22-9
202	61501	para Dichlorobenzene *	00114-26-1
203	57501	Parathion	00106-46-7
204	108501	Pendimethalin	00056-38-2
205	56502	Pentachloronitrobenzene	40487-42-1
206	63001	Pentachlorophenol	00082-69-8
206	63003	Pentachlorophenol Salts and Esters	00087-86-5
207	108001	Perfluidone	00131-52-2
208	109701	Permethrin	37924-13-3
209	98701	Phenmedipham	52645-53-1
210	64501	Phenothiazine	13684-63-4
211	64103	Phenylphenol	00092-84-2
212	57201	Phorate	00090-43-7
213	97701	Phosalone	00298-02-2
214	18201	Phosphamidon	02310-17-0
215	5101	Picloram	13171-21-6
215	5104	Picloram Salts and Esters	01918-02-1
216	67501	Piperonyl butoxide	02545-60-0
217	69183	PBED (Busan 77) [Poly (oxyethylene (dimethylimino) ethylene (dimethylimino) ethylene dichloride)]	00051-03-6
218	34803	Busan 85 [Potassium dimethyldithiocarbamate]	31512-74-0
219	102901	Busan 40 [Potassium N-hydroxymethyl-N-methyldithiocarbamate]	00128-03-0
220	39002	KN Methyl [Potassium N-methyldithiocarbamate]	51026-28-9
221	101301	Metasol J26 [Potassium N-(alpha-(nitroethyl) benzyl)-ethylenediamine]	00137-41-7
222	111401	Profenofos	53404-62-9
223	80804	Prometon	41198-08-7
224	80805	Prometryn	01610-18-0
225	97601	Propargite	07287-19-6
226	80808	Propazine	02312-35-8
227	77702	Propionic acid	00139-40-2
228	119301	Propamocarb and Propamocarb HCL	00079-09-4
229	69004	Pyrethrin coils	24579-73-5
230	69001	Pyrethrin I	00121-21-1
231	69002	Pyrethrum (other than pyrethrins)	
232	69006	Pyrethrin II	08003-34-7
233	97801	Resmethrin	00121-29-9
234	58301	Ronnel	10453-86-8
235	71003	Rotenone	00299-84-3
236	74801	DEF [S,S,S-Tributyl phosphorotrithioate]	00083-79-4
237	35509	Siduron	00078-48-8
238	82501	Silvex [2-(2,4,5-Trichlorophenoxy)propionic acid]	01982-49-6
238	(1)	Silvex Salts and Esters	00093-72-1
239	80807	Simazine	(1)
240	103901	Bentazon	00122-34-9
241	34804	Carbam-S [Sodium dimethyldithiocarbamate]	25057-89-0
242	75003	Sodium monofluoroacetate	00128-04-1
246	39003	Vapam [Sodium methyldithiocarbamate]	00062-74-8
244	57101	Sulfoxide	00137-42-8
245	41301	Cycloate	00120-62-7
246	41401	EPTC [S-Ethyl dipropylthiocarbamate]	01134-23-2
			00759-94-4



TABLE 1.—LIST OF PESTICIDE ACTIVE INGREDIENTS—Continued

EPA census code	Pesticide code	Pesticide name	CAS No.
247	41402	Molinate	02212-67-1
248	41403	Pebulate	01114-71-2
249	41404	Vernolate	01929-77-7
250	35604	HPTMS [S-(2-Hydroxypropyl) thiomethanesulfonate]	29803-57-4
251	9801	Bensulide	00741-58-2
252	105501	Tebuthiuron	34014-18-1
253	59001	Temephos	03383-96-8
254	12701	Terbacil	05902-51-2
255	105001	Terbufos	13071-79-9
256	80814	Terbutylazine	05915-41-3
257	80813	Terbutryn	00886-50-0
258	63004	Tetrachlorophenol	25167-83-3
258	63007	Tetrachlorophenol Salts and Esters	53535-27-6
259	35602	Dazomet	00533-74-4
260	102001	Thiophanate methyl	23564-05-8
261	79801	Thiram	00137-26-8
262	80501	Toxaphene	08001-35-2
263	74901	Merphos [Tributyl phosphorotrithioate]	00150-50-5
264	36101	Trifluralin	01582-09-8
265	86002	Warfarin [3-( $\alpha$ -Acetonylbenzyl)-4-hydroxycoumarin]	00081-81-2
265	( <sup>1</sup> )	Warfarin Salts and Esters	( <sup>1</sup> )
266	51705	Zinc MBT [Zinc 2-mercaptobenzothiazolate]	00155-04-4
267	14506	Zineb	12122-67-7
268	34805	Ziram	00137-30-4
269	78802	S-(2,3,3-trichloroallyl) diisopropylthiocarbamate	02303-17-5
270	69005	Phenothrin	26002-80-2
271	69003	Tetramethrin	07696-12-0
272	18301	Chloroprotham	00101-21-3

<sup>1</sup> Multiple compounds for active ingredient.<sup>2</sup> Deleted. Chemical is covered by Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) Effluent Guidelines and Standards (40 CFR Part 414).

TABLE 2.—PESTICIDE ACTIVE INGREDIENT EFFLUENT LIMITATIONS BEST AVAILABLE TECHNOLOGY ECONOMICALLY ACHIEVABLE (BAT) AND PRETREATMENT STANDARDS FOR EXISTING SOURCES (PSES)

Pesticide	Daily maximum shall not exceed kg/kg (lb/1,000 lb)	Monthly average shall not exceed kg/kg (lb/1,000 lb)	Notes
2,4-D	$1.19 \times 10^{-4}$	$3.40 \times 10^{-3}$	( <sup>1</sup> )
2,4-D Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
2,4-DB Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Acephate	( <sup>2</sup> )	( <sup>2</sup> )	
Acifluorfen	$2.32 \times 10^{-3}$	$8.79 \times 10^{-3}$	
Alachlor	$8.82 \times 10^{-4}$	$2.68 \times 10^{-4}$	
Aldicarb	$7.23 \times 10^{-4}$	$3.12 \times 10^{-4}$	( <sup>1</sup> )
Ametryn	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Atrazine	$2.56 \times 10^{-3}$	$1.02 \times 10^{-3}$	
Azinphos Methyl	$2.74 \times 10^{-2}$	$1.41 \times 10^{-2}$	
Bentfluralin	$3.22 \times 10^{-4}$	$1.09 \times 10^{-4}$	( <sup>1, 2</sup> )
Benomyl	$1.91 \times 10^{-1}$	$5.14 \times 10^{-2}$	( <sup>1</sup> )
Biphenyl	( <sup>2</sup> )	( <sup>2</sup> )	
Bolstar	$1.69 \times 10^{-2}$	$8.72 \times 10^{-3}$	
Bromacil	$1.24 \times 10^{-1}$	$4.18 \times 10^{-2}$	
Bromacil, lithium	( <sup>2</sup> )	( <sup>2</sup> )	
Bromoxynil	$3.95 \times 10^{-3}$	$1.27 \times 10^{-3}$	
Bromoxynil octanoate	$3.95 \times 10^{-3}$	$1.27 \times 10^{-3}$	

TABLE 2.—PESTICIDE ACTIVE INGREDIENT EFFLUENT LIMITATIONS BEST AVAILABLE TECHNOLOGY ECONOMICALLY ACHIEVABLE (BAT) AND PRETREATMENT STANDARDS FOR EXISTING SOURCES (PSES)—Continued

Pesticide	Daily maximum shall not exceed kg/kg (lb/1,000 lb)	Monthly average shall not exceed kg/kg (lb/1,000 lb)	Notes
Busan 40 [Potassium N-hydroxy-methyl-N-methylidithiocarbamate]	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Busan 85 [Potassium dimethyl-dithiocarbamate]	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Butachlor	$3.53 \times 10^{-3}$	$1.09 \times 10^{-3}$	
Captafol	( <sup>2</sup> )	( <sup>2</sup> )	
Carbam-S [Sodium dimethyl-dithiocarbamate]	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Carbaryl	$1.6 \times 10^{-3}$	$7.3 \times 10^{-4}$	( <sup>1</sup> )
Carbofuran	$1.18 \times 10^{-4}$	$2.80 \times 10^{-5}$	
Chloroneb	$8.16 \times 10^{-2}$	$3.31 \times 10^{-3}$	
Chlorothalonil	$1.51 \times 10^{-3}$	$4.57 \times 10^{-4}$	
Chlorpyrifos	$3.27 \times 10^{-4}$	$9.96 \times 10^{-5}$	( <sup>1</sup> )
Cyanazine	$1.63 \times 10^{-3}$	$8.11 \times 10^{-4}$	
Dazomet	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
DCPA	$7.79 \times 10^{-2}$	$2.64 \times 10^{-2}$	

TABLE 2.—PESTICIDE ACTIVE INGREDIENT EFFLUENT LIMITATIONS BEST AVAILABLE TECHNOLOGY ECONOMICALLY ACHIEVABLE (BAT) AND PRETREATMENT STANDARDS FOR EXISTING SOURCES (PSES)—Continued

Pesticide	Daily maximum shall not exceed kg/kg (lb/1,000 lb)	Monthly average shall not exceed kg/kg (lb/1,000 lb)	Notes
DEF [S,S-S-Tributyl phosphorotrithio-ate]	$1.15 \times 10^{-2}$	$5.58 \times 10^{-3}$	
Diazinon	$2.82 \times 10^{-3}$	$1.12 \times 10^{-3}$	( <sup>1</sup> )
Dichlorprop Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Dichlorvos	$9.6 \times 10^{-3}$	$2.95 \times 10^{-3}$	
Dinoseb	4.73	1.43	
Dioxathion	$3.40 \times 10^{-2}$	$1.29 \times 10^{-2}$	
Dusulfoton	$7.33 \times 10^{-3}$	$3.79 \times 10^{-3}$	
Diuron	$3.15 \times 10^{-3}$	$1.4 \times 10^{-3}$	
Endothall Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Endrin	$2.2 \times 10^{-2}$	$5.1 \times 10^{-3}$	
Ethalfuralin	$3.22 \times 10^{-4}$	$1.09 \times 10^{-4}$	1, 2
Ethion	$7.37 \times 10^{-4}$	$2.99 \times 10^{-4}$	
Fenarimol	$1.02 \times 10^{-1}$	$3.61 \times 10^{-2}$	
Fensulfotlone	$1.48 \times 10^{-2}$	$7.64 \times 10^{-3}$	
Fenthion	$1.83 \times 10^{-2}$	$9.45 \times 10^{-3}$	
Fenvalerate	$5.40 \times 10^{-3}$	$2.08 \times 10^{-3}$	
Glyphosate Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Heptachlor	$8.8 \times 10^{-3}$	$2.9 \times 10^{-3}$	
Isopropalin	$7.06 \times 10^{-3}$	$2.49 \times 10^{-3}$	( <sup>1</sup> )



TABLE 2.—PESTICIDE ACTIVE INGREDIENT EFFLUENT LIMITATIONS BEST AVAILABLE TECHNOLOGY ECONOMICALLY ACHIEVABLE (BAT) AND PRETREATMENT STANDARDS FOR EXISTING SOURCES (PSES)—Continued

Pesticide	Daily maximum shall not exceed	Monthly average shall not exceed	Notes
	kg/kg (lb/1,000 lb)	kg/kg (lb/1,000 lb)	
KN Methyl [Potassium N-methyldithiocarbamate]	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Linuron	$2.69 \times 10^{-3}$	$1.94 \times 10^{-3}$	
Malathion	$2.35 \times 10^{-4}$	$9.55 \times 10^{-5}$	
MCPA Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
MCPP Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Merphos	$1.15 \times 10^{-2}$	$5.58 \times 10^{-3}$	
Methamidophos	$1.46 \times 10^{-2}$	$7.53 \times 10^{-3}$	1
Methomyl	$3.82 \times 10^{-3}$	$1.76 \times 10^{-3}$	
Methoxychlor	$3.23 \times 10^{-3}$	$1.31 \times 10^{-3}$	
Metribuzin	$1.36 \times 10^{-3}$	$7.04 \times 10^{-4}$	
Mevinphos	$1.44 \times 10^{-4}$	$5.10 \times 10^{-5}$	
Nabam	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Nabonate	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Naled	( <sup>2</sup> )	( <sup>2</sup> )	
Norflurazon	( <sup>2</sup> )	( <sup>2</sup> )	
Organo-tin pesticides	$1.72 \times 10^{-2}$	$7.42 \times 10^{-3}$	( <sup>4</sup> )
Parthion	$7.72 \times 10^{-4}$	$3.43 \times 10^{-4}$	
Parathion methyl	$7.72 \times 10^{-4}$	$3.43 \times 10^{-4}$	
PCNB	$5.75 \times 10^{-4}$	$1.90 \times 10^{-4}$	
Pendimethalin	$3.21 \times 10^{-3}$	$1.06 \times 10^{-3}$	
Permethrin	$2.32 \times 10^{-4}$	$6.06 \times 10^{-5}$	
Phorate	$2.51 \times 10^{-4}$	$7.53 \times 10^{-5}$	
Phosmet	( <sup>2</sup> )	( <sup>2</sup> )	( <sup>5</sup> )
Prometon	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Prometryn	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Pronamide	$2.0 \times 10^{-4}$	$6.9 \times 10^{-5}$	
Propachlor	$5.34 \times 10^{-3}$	$1.66 \times 10^{-3}$	
Propanil	$1.06 \times 10^{-3}$	$4.84 \times 10^{-4}$	
Propazine	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Pyrethrin I	( <sup>2</sup> )	( <sup>2</sup> )	
Pyrethrin II	( <sup>2</sup> )	( <sup>2</sup> )	
Simazine	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Stirofos	$4.10 \times 10^{-3}$	$1.35 \times 10^{-3}$	
TCMTB	$2.88 \times 10^{-4}$	$8.96 \times 10^{-5}$	
Tebuthiuron	$9.78 \times 10^{-2}$	$3.40 \times 10^{-2}$	
Terbacil	$1.51 \times 10^{-1}$	$5.12 \times 10^{-2}$	
Terbufos	$4.09 \times 10^{-4}$	$1.06 \times 10^{-4}$	
Terbutylazine	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Terbutryn	$2.10 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Toxaphene	$1.02 \times 10^{-2}$	$3.71 \times 10^{-3}$	
Triadimefon	$6.52 \times 10^{-2}$	$3.41 \times 10^{-2}$	
Trifluralin	$3.22 \times 10^{-4}$	$1.09 \times 10^{-4}$	( <sup>1, 2</sup> )
Vapam [Sodium methyldithiocarbamate]	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	
Ziram [Zinc dimethyldithiocarbamate]	$5.74 \times 10^{-3}$	$1.87 \times 10^{-3}$	

## Notes

- <sup>1</sup> Monitor and comply after in-plant treatment before mixing with other wastewaters.  
<sup>2</sup> No discharge of process wastewater pollutants.  
<sup>3</sup> Monitor and report as total Trifluralin.  
<sup>4</sup> Monitor and report as total tin.  
<sup>5</sup> Applies to purification by recrystallization portion of the process.

TABLE 3.—PESTICIDE ACTIVE INGREDIENT EFFLUENT LIMITATIONS NEW SOURCE PERFORMANCE STANDARDS (NSPS) AND PRETREATMENT STANDARDS FOR NEW SOURCES (PSNS)

Pesticide	Daily maximum shall not exceed	Monthly average shall not exceed	Notes
	kg/kg (lb/1,000 lb)	kg/kg (lb/1,000 lb)	
2,4-D	$8.54 \times 10^{-5}$	$2.45 \times 10^{-5}$	( <sup>1</sup> )
2,4-D Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
2,4-DB Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Acephate	( <sup>2</sup> )	( <sup>2</sup> )	
Acifluorfen	$1.67 \times 10^{-2}$	$6.33 \times 10^{-3}$	( <sup>1</sup> )
Alachlor	$6.35 \times 10^{-4}$	$1.93 \times 10^{-4}$	
Aldicarb	$5.21 \times 10^{-4}$	$2.25 \times 10^{-4}$	( <sup>1</sup> )
Ametryn	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Atrazine	$1.85 \times 10^{-3}$	$7.32 \times 10^{-4}$	
Benfluralin	$2.32 \times 10^{-4}$	$7.82 \times 10^{-5}$	( <sup>1, 2</sup> )
Benomyl	$1.37 \times 10^{-1}$	$3.70 \times 10^{-2}$	( <sup>1</sup> )
Biphenyl	( <sup>2</sup> )	( <sup>2</sup> )	
Bolstar	$1.22 \times 10^{-2}$	$6.27 \times 10^{-3}$	
Bromacil	$8.89 \times 10^{-2}$	$3.01 \times 10^{-2}$	
Bromacil, lithium	( <sup>2</sup> )	( <sup>2</sup> )	
Bromoxynil	$2.84 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Bromoxynil Octanoate	$2.84 \times 10^{-3}$	$9.14 \times 10^{-4}$	
Busan 40 [Potassium N-hydroxymethyl-N-methyldithiocarbamate]	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Busan 85 [Potassium dimethyldithiocarbamate]	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Butachlor	$2.54 \times 10^{-3}$	$7.87 \times 10^{-4}$	
Captafol	( <sup>2</sup> )	( <sup>2</sup> )	
Carbam-S [Sodium dimethyldithiocarbamate]	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Carbaryl	$1.18 \times 10^{-3}$	$5.24 \times 10^{-4}$	( <sup>1</sup> )
Carbofuran	$1.18 \times 10^{-4}$	$2.80 \times 10^{-5}$	
Chloroneb	$5.87 \times 10^{-2}$	$2.39 \times 10^{-2}$	
Chlorothalonil	$1.09 \times 10^{-3}$	$3.29 \times 10^{-4}$	
Chlorpyrifos	$2.35 \times 10^{-4}$	$7.17 \times 10^{-5}$	( <sup>1</sup> )
Cyanazine	$1.18 \times 10^{-3}$	$5.84 \times 10^{-4}$	
Dazomet	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
DCPA	$5.61 \times 10^{-2}$	$1.90 \times 10^{-2}$	
DEF [S,S-S-Tributyl phosphorothioate]	$1.15 \times 10^{-2}$	$5.58 \times 10^{-3}$	
Diazinon	$2.05 \times 10^{-3}$	$8.13 \times 10^{-4}$	( <sup>1</sup> )
Dichlorprop Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Dichlorvos	$6.88 \times 10^{-5}$	$2.13 \times 10^{-5}$	
Dinoseb	3.41	1.03	
Dioxathion	$2.44 \times 10^{-2}$	$9.31 \times 10^{-3}$	
Disulfoton	$5.28 \times 10^{-3}$	$2.72 \times 10^{-3}$	
Diuron	$2.27 \times 10^{-2}$	$1.01 \times 10^{-2}$	
Endothall Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Endrin	$1.57 \times 10^{-2}$	$3.69 \times 10^{-3}$	( <sup>1, 2</sup> )
Ethalfuralin	$2.32 \times 10^{-4}$	$7.82 \times 10^{-5}$	
Ethion	$5.31 \times 10^{-4}$	$2.15 \times 10^{-4}$	
Fenarimol	$7.31 \times 10^{-2}$	$2.60 \times 10^{-2}$	
Fensulfthion	$1.06 \times 10^{-2}$	$5.50 \times 10^{-3}$	
Fenthion	$1.32 \times 10^{-2}$	$6.79 \times 10^{-3}$	
Fenvalerate	$3.91 \times 10^{-3}$	$1.50 \times 10^{-3}$	
Glyphosate Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	

TABLE 3.—PESTICIDE ACTIVE INGREDIENT EFFLUENT LIMITATIONS NEW SOURCE PERFORMANCE STANDARDS (NSPS) AND PRETREATMENT STANDARDS FOR NEW SOURCES (PSNS)—Continued

Pesticide	Daily maximum shall not exceed	Monthly average shall not exceed	Notes
	kg/kg (lb/1,000 lb)	kg/kg (lb/1,000 lb)	
Guthion	$1.97 \times 10^{-2}$	$1.02 \times 10^{-2}$	
Heptachlor	$6.31 \times 10^{-3}$	$2.06 \times 10^{-3}$	( <sup>1</sup> )
Isopropalin	$5.07 \times 10^{-3}$	$1.82 \times 10^{-3}$	
KN Methyl [Potassium N-methyldithiocarbamate]	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Linuron	$1.94 \times 10^{-3}$	$1.40 \times 10^{-3}$	
Malathion	$1.69 \times 10^{-4}$	$6.88 \times 10^{-5}$	
MCPA Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
MCPP Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Merphos	$1.15 \times 10^{-2}$	$5.58 \times 10^{-3}$	
Methamidophos	$1.05 \times 10^{-2}$	$5.42 \times 10^{-3}$	
Methomyl	$2.75 \times 10^{-3}$	$1.27 \times 10^{-3}$	( <sup>1</sup> )
Methoxychlor	$2.34 \times 10^{-3}$	$9.25 \times 10^{-4}$	
Metribuzin	$9.80 \times 10^{-3}$	$5.06 \times 10^{-3}$	
Mevinphos	$1.03 \times 10^{-4}$	$3.69 \times 10^{-5}$	
Nabam	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Nabonate	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Naled	( <sup>2</sup> )	( <sup>2</sup> )	
Norflurazon	( <sup>2</sup> )	( <sup>2</sup> )	
Organo-tin pesticides	$1.25 \times 10^{-2}$	$5.36 \times 10^{-3}$	( <sup>4</sup> )
Parathion Ethyl	$5.56 \times 10^{-4}$	$2.45 \times 10^{-4}$	
Parathion Methyl	$5.56 \times 10^{-4}$	$2.45 \times 10^{-4}$	
PCNB	$4.16 \times 10^{-4}$	$1.38 \times 10^{-4}$	
Pendimethalin	$2.31 \times 10^{-3}$	$7.64 \times 10^{-4}$	
Pentachlorophenol Salts and Esters	( <sup>2</sup> )	( <sup>2</sup> )	
Permethrin	$1.68 \times 10^{-4}$	$4.39 \times 10^{-5}$	
Phorate	$1.81 \times 10^{-4}$	$5.43 \times 10^{-5}$	
Phosmet	( <sup>2</sup> )	( <sup>2</sup> )	( <sup>5</sup> )
Prometon	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Prometryn	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Pronamide	$1.28 \times 10^{-4}$	$4.34 \times 10^{-5}$	
Propachlor	$3.84 \times 10^{-3}$	$1.19 \times 10^{-3}$	
Propanil	$7.63 \times 10^{-4}$	$3.48 \times 10^{-4}$	
Propazine	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Pyrethrin I	( <sup>2</sup> )	( <sup>2</sup> )	
Pyrethrin II	( <sup>2</sup> )	( <sup>2</sup> )	
Simazine	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Stirofos	$2.95 \times 10^{-3}$	$9.72 \times 10^{-4}$	
TCMTB	$2.07 \times 10^{-4}$	$6.45 \times 10^{-5}$	
Tebuthiuron	$7.04 \times 10^{-2}$	$2.45 \times 10^{-2}$	
Terbacil	$1.09 \times 10^{-1}$	$3.69 \times 10^{-2}$	
Terbufos	$2.95 \times 10^{-4}$	$7.62 \times 10^{-5}$	
Terbutylazine	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Terbutryn	$1.51 \times 10^{-3}$	$6.58 \times 10^{-4}$	
Toxaphene	$7.35 \times 10^{-3}$	$2.67 \times 10^{-3}$	
Triadimefon	$4.69 \times 10^{-2}$	$2.46 \times 10^{-2}$	
Trifluralin	$2.32 \times 10^{-4}$	$7.82 \times 10^{-5}$	( <sup>1, 2</sup> )
Vapam [Sodium methyldithiocarbamate]	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	
Ziram [Zinc dimethyldithiocarbamate]	$4.14 \times 10^{-3}$	$1.35 \times 10^{-3}$	

## Notes

- <sup>1</sup> Monitor and comply after in-plant treatment before mixing with other wastewaters.  
<sup>2</sup> No discharge of process wastewater pollutants.  
<sup>3</sup> Monitor and report as total Trifluralin.  
<sup>4</sup> Monitor and report as total tin.  
<sup>5</sup> Applies to purification by recrystallization portion of the process.



TABLE 4.—BAT AND NSPS EFFLUENT LIMITATIONS FOR PRIORITY POLLUTANTS FOR DIRECT DISCHARGE POINT SOURCES THAT USE END-OF-PIPE BIOLOGICAL TREATMENT

Pollutant	Daily maximum shall not exceed micrograms per liter (µg/l)	Monthly average shall not exceed micrograms per liter (µg/l)
1,1-Dichloroethylene	25	16
1,1,1-Trichloroethane	54	21
1,2-Dichloroethane	211	68
1,2-Dichloropropane	230	153
1,2-Dichlorobenzene	163	77
1,2-trans-Dichloroethylene	54	21
1,3-Dichloropropane	44	29
1,4-Dichlorobenzene	28	15
2-chlorophenol	98	31
2,4-Dichlorophenol	112	39
2,4-Dimethylphenol	36	18
Benzene	136	37
Bromodichloromethane	89	40
Bromomethane	25	16
Chlorobenzene	28	15
Chloromethane	190	66
Cyanide (Total)	640	220
Dibromochloromethane	211	68
Dichloromethane	89	40
Ethylbenzene	108	32
Lead (Total)	690	320
Naphthalene	59	22
Phenol	26	15
Tetrachloroethylene	56	22
Tetrachloromethane	38	18
Toluene	80	26
Tribromomethane	59	22
Trichloromethane	46	21

TABLE 5.—BAT AND NSPS EFFLUENT LIMITATIONS FOR PRIORITY POLLUTANTS FOR DIRECT DISCHARGE POINT SOURCES THAT DO NOT USE END-OF-PIPE BIOLOGICAL TREATMENT

Pollutant	Daily maximum shall not exceed (micrograms per liter (µg/l))	Monthly average shall not exceed (micrograms per liter (µg/l))
1,1-Dichloroethylene	60	22
1,1,1-Trichloroethane	59	22
1,2-trans-Dichloroethylene	66	25
1,2-Dichlorobenzene	794	196
1,2-Dichloropropane	794	196
1,2-Dichloroethane	574	180
1,3-Dichloropropane	794	196
1,4-Dichlorobenzene	380	142
2,4-Dimethylphenol	47	19
Benzene	134	57
Bromodichloromethane	89	40
Bromomethane	25	16
Chlorobenzene	380	142
Chloromethane	230	110
Cyanide (Total)	640	220
Dibromochloromethane	211	68
Dichloromethane	170	38
Ethylbenzene	380	142
Lead (Total)	690	320
Naphthalene	47	19
Phenol	47	19
Tetrachloroethylene	164	52
Tetrachloromethane	380	142
Toluene	74	28
Tribromomethane	59	22
Trichloromethane	46	21

TABLE 6.—PSES AND PSNS EFFLUENT LIMITATIONS FOR PRIORITY POLLUTANTS

Pollutant	Daily maximum shall not exceed (micrograms per liter (µg/l))	Monthly maximum shall not exceed (micrograms per liter (µg/l))
1,1-Dichloroethylene	60	22
1,1,1-Trichloroethane	59	22
1,2-trans-Dichloroethylene	66	25
1,2-Dichlorobenzene	794	196
1,2-Dichloropropane	794	196
1,2-Dichloroethane	574	180
1,3-Dichloropropane	794	196
1,4-Dichlorobenzene	380	142
2,4-Dimethylphenol	47	19
Benzene	134	57
Bromodichloromethane	89	40
Bromomethane	25	16
Chlorobenzene	380	142
Chloromethane	295	110
Cyanide (Total)	640	220
Dibromochloromethane	211	68
Dichloromethane	170	36
Ethylbenzene	380	142
Lead (Total)	690	320
Naphthalene	47	19
Phenol	47	19
Tetrachloroethylene	164	52
Tetrachloromethane	380	142
Toluene	74	28
Tribromomethane	59	22
Trichloromethane	325	111

TABLE 7.—TEST METHODS FOR PESTICIDE ACTIVE INGREDIENTS

EPA survey code	Pesticide name	CAS No.	EPA analytical method no.(s)
8	Triadimefon	43121-43-3	507/633/525.1
12	Dichlorvos	00062-73-7	1618/507/622/525.1
16	2,4-D; 2,4-D Salts and Esters [2,4-Dichlorophenoxyacetic acid]	00094-75-7	1618/515.1/615
17	2,4-DB; 2,4-DB Salts and Esters [2,4-Dichlorophenoxybutyric acid]	00094-82-6	1618/515.1/615
22	Mevinphos	07786-34-7	1618/507/622/525.1
25	Cyanazine	21725-46-2	629
26	Propachlor	01918-16-7	1618/508/608.1/525.1
27	MCPA; MCPA Salts and Esters [2-Methyl-4-chlorophenoxyacetic acid]	00094-74-6	1618/615
30	Dichlorprop; Dichlorprop Salts and Esters [2-(2,4-Dichlorophenoxy) propionic acid]	00120-36-5	1618/515.1/615
31	MCPP; MCPP Salts and Esters [2-(2-Methyl-4-chlorophenoxy) propionic acid]	00093-65-2	1618/615
35	TCMTB [2-(Thiocyanomethylthio) benzothiazole]	21564-17-0	637
39	Pronamide	23950-58-5	525.1
41	Propanil	00709-98-8	632.1
45	Metribuzin	21087-64-9	507/633/525.1
52	Acephate	30560-19-1	1656/1618
53	Acifluorfen	50594-66-6	515.1
54	Alachlor	15972-60-8	505/507/645/525.1
55	Aldicarb	00116-06-3	531.1
58	Ametryn	00834-12-8	507/619/525.1
60	Atrazine	01912-24-9	505/507/619525.1
62	Benomyl	17804-35-2	631
67	Biphenyl	00092-52-4	1625/642
68	Bromacil; Bromacil Salts and Esters	00314-40-9	507/633/525.1
69	Bromoxynil	01689-84-5	1656/1625
69	Bromoxynil octanoate	01689-99-2	1656
70	Butachlor	23184-66-9	507/645/525.1
73	Captafol	02425-06-1	1618
75	Carbaryl [Sevin]	00063-25-2	531.1/632



TABLE 7.—TEST METHODS FOR PESTICIDE ACTIVE INGREDIENTS—Continued

EPA survey code	Pesticide name	CAS No.	EPA analytical method no.(s)
76	Carbofuran	01563-66-2	531.1/632
80	Chloroneb	02675-77-6	1618/508/608.1/525.1
82	Chlorothalonil	01897-45-6	508/608.2/525.1
84	Stirofos	00961-11-5	1618/507/622/525.1
86	Chlorpyrifos	02921-88-2	1618/508/622
90	Fenvalerate	51630-58-1	1656
103	Diazinon	00333-41-5	1618/507/614/622/525.1
107	Parathion methyl	00298-00-0	1618/614/622
110	DCPA [Dimethyl 2,3,5,6-tetrachloroterephthalate]	01861-32-1	508/608.2/525.1
112	Dinoseb	00088-85-7	1618/515.1/615
113	Dioxathion	00078-34-2	1618/614.1
118	Nabonate [Disodium cyanodithioimidocarbonate]	00138-93-2	630.1
119	Diuron	00330-54-1	632
123	Endothall	00145-73-3	548
124	Endrin	00072-20-8	1618/505/508/608/617/525.1
125	Ethalfuralin	55283-68-6	*627
126	Ethion	00563-12-2	1618/614/614.1
127	Ethoprop	13194-48-4	1618/507/622
132	Fenarimol	60168-88-9	507/633.1/525.1
133	Fenthion	00055-38-9	1618/622
138	Glyphosate [N-(Phosphonomethyl) glycine]	01071-83-6	547/140A
140	Heptachlor	00076-44-8	1618/505/508/608/617/525.1
144	Isopropalin	33820-53-0	627
148	Linuron	00330-55-2	632
150	Malathion	00121-75-5	1618/614
154	Methamidophos	10265-92-6	1618
156	Methomyl	16752-77-5	531.1/632
158	Methoxychlor	00072-43-5	1618/505/508/608.2/617/525.1
172	Nabam	00142-59-6	630/630.1
173	Naled	00300-76-5	1618/622
175	Norflurazon	27314-13-2	507/645/525.1
178	Benfluralin	01861-40-1	*627
182	Fensulfotiothion	00115-90-2	1618/622
183	Disulfoton	00298-04-4	1618/507/614/622/525.1
185	Phosmet	00732-11-6	1618/622.1
186	Azinphos Methyl	00086-50-0	1618/614/622
192	Organo-tin pesticides	12379-54-3	Industry/200.7/200.9
197	Bolstar	35400-43-2	1618/622
203	Parathion	00056-38-2	1618/614
204	Pendimethalin	40487-42-1	1656
205	Pentachloronitrobenzene	00082-68-8	1618/608.1/617
206	Pentachlorophenol	00087-86-5	625/1625
208	Permethrin	52645-53-1	608.2/508/525.1
212	Phorate	00298-02-2	1618/622
218	Busan 85 [Potassium dimethyldithiocarbamate]	00128-03-0	630/630.1
219	Busan 40 [Potassium N-hydroxymethyl-N-methyldithiocarbamate]	51026-28-9	630/630.1
220	KN Methyl [Potassium N-methyldithiocarbamate]	00137-41-7	630/630.1
223	Prometon	01610-18-0	507/619/525.1
224	Prometryn	07287-19-6	507/619/525.1
226	Propazine	00139-40-2	507/619/525.1
230	Pyrethrin I	00121-21-1	508
232	Pyrethrin II	00121-29-9	508
236	DEF [S,S,S-Tributyl phosphorotrithioate]	00078-48-8	1656/1618
239	Simazine	00122-34-9	505/507/619/525.1
241	Carbam-S [Sodium dimethyldithiocarbamate]	00128-04-1	630/630.1
243	Vapam [Sodium methyldithiocarbamate]	00137-42-8	630/630.1
252	Tebuthiuron	34014-18-1	507/525.1
254	Terbacil	05902-51-2	507/633/525.1
255	Terbufos	13071-79-9	1618/507/614.1/525.1
256	Terbutylazine	05915-41-3	619
257	Terbutryn	00886-50-0	507/619/525.1
259	Dazomet	00533-74-4	131/630/630.1
262	Toxaphene	08001-35-2	1618/505/508/608/617
263	Merphos [Tributyl phosphorotrithioate]	00150-50-5	1656/1618/525.1
264	Trifluralin	01582-09-8	1618/508/617/627/525.1
268	Ziram [Zinc dimethyldithiocarbamate]	00137-30-4	630/630.1

\*Monitor and report as total Trifluralin.

[FR Doc. 92-7956 Filed 4-9-92; 8:45 am]

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# Federal Register

Friday  
April 10, 1992

## Part III

## Department of Defense

### Department of the Army

#### 32 CFR Part 627

#### Biological Defense Safety Program; Final Rule



**DEPARTMENT OF DEFENSE****Department of the Army****32 CFR Part 627**

[DA Pamphlet 385-69]

**Biological Defense Safety Program  
(Technical Safety Requirements)****AGENCY:** Department of the Army, DoD.**ACTION:** Final rule.

**SUMMARY:** The Department of the Army (DA) acting as executive agent for the Department of Defense announces the Technical Safety Requirements of the Army Biological Defense Safety Program contained in 32 CFR part 626 and in Department of the Army Pamphlet 385-69. This rule prescribes the technical safety requirements for the use, handling, shipment, storage and disposal of etiologic agents used in research, development, test, and evaluation (RDT&E) for the Biological Defense Program (BDP).

**EFFECTIVE DATE:** May 11, 1992.**FOR FURTHER INFORMATION CONTACT:**

If you wish to comment or obtain further information concerning this publication contact: HQDA (DACS-SF), Mr. William Wortley, room 2C717, Pentagon, Washington, DC 20310-0200, (703) 695-7291.

**SUPPLEMENTARY INFORMATION:** The U.S. Army BDP, on behalf of the Department of Defense, supports RDT&E efforts to maintain and develop defensive measures and material to meet potential biological warfare threats. The program's objectives are to develop measures for identification, detection, treatment, protection, and decontamination of these threats. To meet the program objectives, it is necessary to use etiologic agents in the conduct of the necessary RDT&E. This document contains information on the safe use, handling, storage, shipment and disposal of etiologic agents and describes requirements based on the Centers for Disease Control Guidelines, Biosafety in Microbiological and Biomedical Laboratories, and establishes guidelines for toxins. This document was developed in coordination with the biological defense community and fully staffed and coordinated with subject matter experts, the Army Staff, and applicable major commands. Army-wide implementation of this program is authorized based on the policies and standards contained in the cited authority and references.

**Executive Order 12291**

This final rule has been reviewed under Executive Order 12291 and the Secretary of the Army has classified this action as nonmajor. The effect of the final rule on the economy will be less than \$100 million.

**Regulatory Flexibility Act**

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 and the Secretary of the Army has certified that this action does not have a significant impact on a substantial number of small entities.

**Paperwork Reduction Act**

This final rule does not contain reporting or recordkeeping requirements subject to approval by the Office of Management and Budget under the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

**List of Subjects in 32 CFR Part 627**

Biologics, Defense, Occupational safety and health, Safety.

Accordingly, 32 CFR part 627 is revised to read as follows:

**PART 627—THE BIOLOGICAL  
DEFENSE SAFETY PROGRAM,  
TECHNICAL SAFETY REQUIREMENTS  
(DA PAMPHLET 385-69)**

**Subpart A—Introduction**

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627.2 Background.  
627.3 Scope.  
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**Subpart B—Administration**

- 627.6 Safety administration.  
627.7 Goal of a laboratory safety program.  
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**Subpart C—Operational Requirements**

- 627.10 Personnel prerequisites.  
627.11 Operational prerequisites.  
627.12 General laboratory techniques.  
627.13 Biosafety level 1.  
627.14 Biosafety level 2.  
627.15 Biosafety level 3.  
627.16 Biosafety level 4.  
627.17 Toxins.  
627.18 Emergencies.  
627.19 Large-scale operations.  
627.20 Operations with radioactive material.

**Subpart D—Personal Protective Equipment**

- 627.21 Introduction.  
627.22 Minimum laboratory attire for use of etiologic agents.  
627.23 Biosafety level 1.  
627.24 Biosafety level 2.  
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627.27 Large-scale (LS) operations.

- 627.28 Solutions of toxins and dry forms of toxins in closed containers.  
627.29 Dry forms of toxins handled in open containers.  
627.30 Situations specified in § 627.18(e).  
627.31 Specific requirements for individual PPE items.

**Subpart E—Decontamination and Disposal**

- 627.32 Introduction.  
627.33 Methods of decontamination.  
627.34 Disposal.

**Subpart F—Importation, Shipment, and Transport of Etiologic Agents**

- 627.35 Introduction.  
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627.38 Shipment directives.  
627.39 Transportation directives.  
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**Subpart G—Facilities**

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627.44 Biosafety level 2.  
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**Subpart H—Engineering Controls**

- 627.49 Introduction.  
627.50 Class I biological safety cabinet.  
627.51 Class II biological safety cabinet.  
627.52 Class III biological safety cabinet.  
627.53 Fume hood.  
627.54 Glove box.  
627.55 Ventilated balance enclosures.  
627.56 Ventilated cage enclosures.  
627.57 Ventilated cage areas.

**Appendix A to Part 627—References****Appendix B to Part 627—Resource List for Immunoprophylaxis of Personnel at Risk****Appendix C to Part 627—Laboratory Safety Inspection Checklist****Appendix D to Part 627—Packaging and Labeling Requirements for Shipment of Etiologic Agents****Appendix E to Part 627—Permits for Importation and Shipment of Etiologic Agents****Appendix F to Part 627—Drawings, Biological Safety Cabinets****Appendix G to Part 627—Glossary**

Authority: 5 U.S.C. 102, 21 U.S.C. 111, 151-158; 42 U.S.C. 216; sec. 361, 58 Stat. 703 and 264; 49 U.S.C. App. 1803, 1804, 1807, and 1808; 50 U.S.C. 1431, 29 CFR 1910.1450(e) and Public Law 101-510, 104 Stat. 1516.

**Subpart A—Introduction****§ 627.1 Purpose.**

This pamphlet prescribes the technical safety requirements for the use, handling, shipment, storage, and disposal of etiologic agents used in research, development, test, and evaluation (RDTE) for the Biological Defense Program (BDP)



**§ 627.2 Background.**

The United States Army BDP, on behalf of the Department of Defense, supports RDTE efforts to maintain and develop defensive measures and materiel to meet potential biological warfare threats. The program's objectives are to develop measures for identification, detection, treatment, protection against, and decontamination of these threats. To meet the program objectives, etiologic agents are used to conduct the necessary handling, storage, shipment, and disposal of etiologic agents. This pamphlet describes requirements based on Centers for Disease Control-National Institute of Health (CDC) (NIH) guidelines, Biosafety in Microbiological and Biomedical Laboratories, and establishes guidelines for toxins.

**§ 627.3 Scope.**

The requirements stated in this pamphlet apply to all elements of the Army to include the ARNG and the USAR and its contractors and subcontractors who use, produce, store, handle, or ship etiologic agents in support of the BDP, regardless of the source of the agent(s).

**§ 627.4 References.**

Required and related publications are listed in appendix A of this part.

**§ 627.5 Abbreviations and terms.**

Abbreviations and special terms used in this part are explained in appendix F of this part.

**Subpart B—Administration****§ 627.6 Safety administration.**

Each BDP institution must have a safety program that complies with AR 385-10, AR 385-69, and this pamphlet. In addition, the safety program must be designed to ensure compliance with—

(a) Occupational Safety and Health Administration (OSHA) requirements for health and safety.

(b) Environmental Protection Agency (EPA) regulations designed to implement the Resource Conservation and Recovery Act (RCRA) and the National Environmental Policy Act (NEPA).

(c) Nuclear Regulatory Commission (NRC) requirements for safe handling of radioactive isotopes (when applicable).

(d) NIH Guidelines for Research Involving Recombinant Deoxyribonucleic Acid (DNA) Molecules.

(e) Relevant national, State, and local regulations.

(f) Any requirements of applicable accrediting bodies.

**§ 627.7 Goal of a laboratory safety program.**

The goals of the laboratory safety program are to protect those working in the laboratory, others who may potentially be exposed to hazards in the laboratory, and the environment. In addition, a laboratory safety program should ensure that hazardous materials will be handled and disposed of in such a way that people, other living organisms, and the environment are protected from harm. Safety awareness must be a part of everyone's habits, and can only be achieved if all senior and responsible staff have a sincere, visible, and continuing interest in preventing injuries and occupational illnesses. Laboratory personnel, for their part, must carry out their work in a way that protects themselves and their fellow workers.

(a) *Laboratory safety.* The safety program will be carried out as stated in AR 385-69. Additionally, the program will contain the following elements—

(1) The commander or institute director, along with all personnel, must have a continuing, observable, and known commitment to the safety program.

(2) An effective institutional safety program requires a safety officer appropriately trained in relevant safety technology. This individual, besides supplying advice and recommendations, will ensure that records are kept showing that the institution's physical facilities and safety rules are internally consistent and compatible with potential risks, as well as in compliance with all applicable laws, regulations, and guidelines.

(3) The commander ensures safety in every department or other equivalent administrative unit of the institution. Ensuring safe operations is an integral function of each level of management through the first line supervisor. The safety office staff must work closely with administrators and investigators to develop and implement written policies and practices that promote safe laboratory work. Collectively, this group routinely must monitor current operations and practices, see that appropriate audits are maintained, and continue to seek ways to improve the safety program.

(4) Safety is a critical job element for each member of the scientific and technical staff. Each individual working in the laboratory must perform his or her job in a manner consistent with safety policy and training.

(5) If laboratory goals dictate operations or substances not suited to the existing facilities or equipment, the laboratory supervisor will, assisted by

the safety officer, advise and assist the laboratory worker in developing or obtaining adequate facilities or equipment and designing appropriate work procedures.

(6) The supervisor will authorize each specific operation, delineate appropriate safety procedures, and instruct those who carry out the operation.

(7) Potential hazards will be identified before work with etiologic agents begins, and actions necessary to avoid accidents and illnesses will be implemented. This practice, called a job safety analysis, consists of breaking a job down into its logical steps, analyzing each for its hazard potential, and deciding the safe procedures to use. The process will be designed by a project director with input from employees, and each step with potential for exposure or other incidents must be described in writing in a standing operating procedure (SOP). All such SOPs will be approved by, at a minimum, the commander or institute director and the safety officer.

(8) The job safety analysis will include a consideration of health hazards identified in AR 40-10 and of maximum credible events as described in paragraph 2-8, AR 385-69.

(b) *Safety plans.* Clearly defined, published safety rules and monitoring procedures for compliance must be established. These rules will be readily available, in writing, for all involved in laboratory operations. This goal may be accomplished by preparing or modifying a facility safety plan, laboratory safety manual, occupational safety and health program or equivalent. This plan will—

(1) Be coordinated with institutional and Federal, State, and local emergency services.

(2) Be practiced with the emergency groups whose services are part of that plan prior to any need for their services, so that they can become familiar with any potential problem areas that may be encountered when they are called upon for assistance.

(3) Describe the method of rapid communication (for telephone, alarms, and so forth) that will be used during an emergency.

(4) Describe the institution's etiologic agent labeling system.

(5) Describe the institution's requirements for testing engineering controls (for example, biological safety cabinets and high efficiency particulate air (HEPA) filters) and essential safety equipment (for example, autoclaves) that are used to conduct RDTE funded by the BDP.

(6) Appoint and train personnel responsible for handling an emergency.



(7) Require that emergency telephone numbers be posted, so that emergency service personnel know whom to contact at all times of the day or night.

(8) Describe the institution's rules that have been established and are practiced to limit access to the facilities where etiologic agents under the sponsorship of the BDP are handled. The rules will include the following requirements:

(i) Access to biosafety level (BL)-1 and BL-1 large-scale (LS) laboratories is limited or restricted at the discretion of the commander or institute director when experiments are in progress.

(ii) Access to areas classified as BL-2, BL-2 LS, or where work with toxins is conducted, is limited by the commander or institute director when work with etiologic agents is in progress.

Individuals who are at increased risk of acquiring infection or for whom infection may be unusually hazardous are not allowed in the laboratory. Only persons who have been advised of the potential hazard and meet any specific entry requirements (for example, immunization) may enter the individual laboratory or animal rooms. The commander or institute director must assess each circumstance and determine who may enter or work in the laboratory.

(iii) Access to areas classified as BL-3 or BL-3 LS is limited as stated in § 627.7(b)(8)(ii), and is restricted to those persons whose presence in the facility or individual laboratory rooms is required for program or support purposes. Individuals under 18 years of age may not enter the controlled area.

(iv) Access to BL-4 facilities is limited as stated in § 627.7(b)(8)(ii) and (iii). This is done with secure, locked doors with access controlled by the commander or institute director, safety officer, or other person responsible for the physical security of the facility. Before entry, all persons will be advised as to the appropriate safeguards for ensuring their safety. Authorized persons must comply with these instructions and all other applicable entry and exit procedures. A logbook will be maintained for all personnel to indicate the date and time of each entry and exit. A card-key activated computer record (or other electronic entry device) may be used if it indicates the date and time of both entry and exit.

(9) Describe the system that is developed and is operational for the reporting of accidents and exposures, employee absenteeism, and for the medical surveillance of potential laboratory-associated illnesses.

(c) *Safety meetings and safety committees.* In effective safety programs, everyone associated with the

laboratory becomes involved. This is done by ensuring maximum participation in planning and by conducting group safety meetings.

(1) A staff safety committee, consisting of the commander or institute director or his or her designated representative, research supervisors, managers, medical personnel, employees, and the safety officer, will be established. This group leads the safety effort, reviews mishaps, and recommends changes in policies, safety program, or equipment as needed to improve safety.

(2) Safety committees will meet at least quarterly and minutes will be prepared and maintained for at least 3 years.

(3) When work with recombinant DNA molecules is undertaken, an institutional biosafety committee (IBC) for review of such work will be established and will function as stated in the NIH Guidelines for Research Involving Recombinant DNA Molecules (see appendix A to this part).

(d) *SOPs.* Besides the documented safety program that will be in effect, each institution will require that an SOP be established for each unique biological defense RDTE operation. The SOPs will meet the criteria stated in AR 385-69 and be reviewed and updated annually. A copy of the SOP will be maintained in the work area. In addition, SOPs will address the following issues—

(1) The unique hazards introduced by the activity in the work area.

(2) The methods of controlling these hazards.

(3) Any unique procedures and requirements needed that are not described as universally required in the safety plan (for example, signs, waste disposal, immunizations, emergency procedures, and personnel monitoring).

(4) Specialized orientation or training of personnel beyond that required in the safety plan.

(5) Ways of ensuring that the unique procedures are followed.

(6) Emergency procedures.

(e) *Safety communications.* Safety communications alert people to newly recognized hazards, remind them of basic biological safety principles, and instill positive attitudes toward safety. Training requirements are also found in § 627.10(b). A system of communication will be established to—

(1) Implement a biological safety training program for all personnel working with hazardous biological or chemical materials.

(2) Publish information addressing useful biological safety advice and accounts of laboratory accidents, along

with the lessons to be learned from them.

(3) Make reference books and regulations concerning laboratory hazards, occupational health, and proper laboratory practices readily available.

(4) Assure that material safety data sheets (MSDS) for hazardous chemicals used in the laboratory are readily available to all employees.

(f) *Safety audits.* One of the essential elements of a good safety program is the conduct of periodic audits of the safety performance in a laboratory. Observing individual safety practices and checking the operability of safety equipment and compliance with safety rules must be part of the audit.

(1) An individual and an alternate will be appointed for each laboratory or room where BDP work is conducted. On a daily basis he or she will monitor the conduct of personnel within their room(s) and maintenance of the room to see that they comply with the safety program and SOPs.

(2) Supervisors will ensure that their projects comply with applicable safety requirements and will audit their areas at least weekly to ensure compliance.

(3) The safety officer or his or her qualified designee will inspect the institution's BL-1, BL-2, and toxin laboratories quarterly. BL-3 and BL-4 laboratories and those in which dry forms of highly potent toxins are handled will be inspected monthly by safety and health professionals. These inspections will be announced and include coverage of general safety practices as well as features specific to a particular biosafety level.

(i) Reports of deficiencies or procedures that create a potentially life-threatening situation will be made directly to supervisory personnel and the commander or institute director and actions will be taken immediately to correct the situation. The operation will not continue until every deficiency is corrected.

(ii) Reports of deficiencies for other than life-threatening situations will be made as soon as possible to the appropriate supervisor, with copies furnished to the commander or institute director. If a problem is widespread, all affected personnel will be notified.

(4) Supervisory personnel notified of safety deficiencies by the safety officer will ensure that the people directly concerned are contacted and that the deficiencies are remedied before operations are resumed.

(5) Malfunctioning equipment must be reported to the appropriate individuals,



labeled to indicate that it should not be used, and repaired promptly.

(6) As a minimum, the audits conducted by the safety officer or his or her qualified designee will cover the items listed in appendix C to this part.

(g) *Documentation.* Records, documenting the following items, will be maintained for 3 years:

(1) Safety audits and the corrective measures.

(2) Risk assessments for proposed new laboratory procedures.

(3) Annual reviews of established SOPs.

(4) Training.

(5) Engineering controls and protective equipment certifications and tests.

(6) Safety committee meeting minutes and recommendations.

(7) Any outside auditor comments and responses.

#### § 627.8 Occupational health.

An occupational health program will be implemented per AR 40-5, chapter 5, for all employees whose employment requires that they conduct duties in a BDP etiologic agent area. Essential elements of the program will include—

(a) *Medical surveillance examinations.* Medical examinations by a licensed medical doctor will be given prior to employment, at least every 3 years thereafter, and upon termination of duties requiring access to laboratories where etiologic agents are used. When full medical examinations are not given annually, health professionals will perform annual health screening. Safety and health professionals will ensure that medical examiners are made aware of all hazardous substances each employee works with at the time of the medical examination. The physician's findings will include assessment of whether an employee has any health condition that would preclude work with etiologic agents. If any of the findings obtained during the examination are outside the normal range, the employee's supervisor and the employee will be notified and counseled on the courses of action available. In addition, a safety and health audit will be conducted to identify any potential occupational causes for the abnormalities, and corrective measures will be taken if applicable.

(b) *Serum samples.* When appropriate, considering the agent(s) handled, baseline serum samples for laboratory and other at-risk personnel will be collected and stored for their biologically useful lifetime, but not longer than 40 years. Additional serum specimens will be collected periodically, based upon the agents handled, or as

required by participation in a special immunizations program. SOPs will be written detailing the collection procedures and periods if serum sampling is deemed necessary.

(c) *Assignment of personnel.* Personnel assigned duties in work areas where etiologic agents are used will be evaluated to determine their suitability for their assigned tasks by the installation medical authority. Only personnel who are physically and mentally capable of working in biocontainment areas (BL-3 and BL-4) or with toxins will be assigned to these duties.

(d) *Immunization of at-risk personnel.* The guidelines for immunizations in the latest edition of the American College of Physicians' Guide for Adult Immunizations and recommendations of Health and Human Services (HHS) in publication number (NIH) 88-8395 shall be followed. A resource list for available immunizations for personnel at risk is given in Appendix B of this part.

(e) *Reporting exposures.* Spills and mishaps which result in observable, known or potential exposures to etiologic agents will be immediately reported to the supervisor, the safety officer, the responsible medical personnel, and the commander. Appropriate medical evaluation, surveillance, and treatment will be provided and written records of these occurrences will be maintained for 40 years. A Med-16 report will be initiated (see AR 40-400).

(f) *Quarantine.* When etiologic agents designated as BL-4 by the CDC-NIH in HHS publication no. (NIH) 88-8395, (or most recent edition) are handled, a facility for the quarantine, isolation, and medical care of personnel with potential or known laboratory-associated exposures will be available.

#### § 627.9 Medical records.

Army activities will maintain medical records in accordance with AR 40-66 and FPM 293-31 for all military and Department of the Army (DA) civilian employees who work with etiologic agents under sponsorship of the BDP.

### Subpart C—Operational Requirements

#### § 627.10 Personnel prerequisites.

(a) *Medical.* Before to assignment to work with etiologic agents, personnel will be evaluated by the appropriate medical personnel with respect to their assignment and will be evaluated in the medical surveillance program described in § 627.8.

(b) *Training.* All personnel directly or indirectly involved with containment or

handling of known and potentially biohazardous material shall receive instruction that adequately prepares them for their assigned duties. Training will be given by occupationally qualified personnel as determined by the commander. This training will be documented and will include—

(1) General training—

(i) Personal hygiene related to laboratory work.

(ii) Laboratory practices.

(iii) Personal protective equipment.

(iv) Effective use of engineering controls.

(v) Packaging, transportation, and shipment of etiologic agents (when applicable).

(vi) Hazardous and infectious waste disposal, handling, and minimization procedures.

(2) Training conducted specifically for the facilities that the individual will be working in, including—

(i) Procedures for the facility.

(ii) Reporting incidents and accidents.

(iii) Labeling and posting of signs.

(iv) Biohazardous waste handling, approaches to minimizing the volume of waste, decontamination, packaging, and disposal.

(v) Emergency procedures.

(3) Additional general training required for work in facilities where viable etiologic agents are present.

(i) Aseptic technique and procedures to include hands-on instruction and demonstration of proficiency.

(ii) Concept and definition of biosafety levels.

(iii) Disinfection and sterilization.

(iv) Safe use of workplace equipment, for example autoclave and centrifuge.

(v) Monitoring and auditing requirements.

(vi) Precautions for handling blood, tissues, and body fluids (when applicable).

(vii) The infectivity, pathogenicity, mode(s) of transmission, and medical surveillance requirements of specific agents.

(viii) Training for all new employees will include a period of supervised orientation in the facilities by a scientist or technician with specific training in the procedures and properties of the etiologic agents in use. During the training period, new laboratory personnel will be under the constant supervision of appropriately trained personnel.

(ix) Personnel who are assigned tasks in BL-2, BL-3, or BL-4 facilities will also have specific training in handling pathogens.

(x) Personnel assigned duties in a BL-4 facility will also have specific and



thorough training in handling extremely hazardous infectious agents, the primary and secondary containment functions of standard and special practices, use of personal protective equipment, containment equipment, and laboratory design characteristics.

(4) Additional general training for handling toxins will include relevant items from § 627.10 plus—

(i) The availability of reference material on the hazards and safe handling of toxic substances.

(ii) The biological effects of the toxin(s) in use.

#### § 627.11 Operational prerequisites.

(a) Evaluation of the risks. The risk assessment of laboratory activities involving the use of etiologic agents is ultimately a subjective process. Those risks associated with the agent, as well as with any adjunct elements of the activity to be conducted, (chemicals, radioisotopes, end-products, and so forth) must be considered in the assessment. The appropriate biosafety level for work with a particular agent or animal study depends on the virulence, pathogenicity, biological stability, route of transmission, and communicability of the agent; the nature of the laboratory; the procedures and manipulations to be used; the quantity and concentration of the agent; and the availability of effective vaccines or therapeutic measures.

(b) The characteristics of etiologic agents, primary laboratory hazards of working with the agent, and recommended biosafety levels are described by CDC-NIH (HHS publication No. (NIH) 88-8395), the considerations for recombinant DNA molecules are described by NIH, and those for oncogenic viruses are described by NCI-NIH (sources listed below). The commander or institute director will assign work with given etiologic agents to the appropriate biosafety level. A risk assessment should take into account not only the NIH Guidelines for Research Involving Recombinant DNA Molecules, but also potential hazards associated with the organism and the product of the experimentation.

(1) When established guidelines exist, these will be followed. The primary source guidelines are—

(i) HHS Publication No. (NIH) 88-8395, *Biosafety in Microbiological and Biomedical Laboratories*, as amended, and updates published in *Morbidity and Mortality Weekly Report*.

(ii) NIH Guidelines for Research Involving Recombinant DNA Molecules (FR 51: 16958-16985 and updates).

(iii) The publication by the American Committee on Arthropod-Borne Viruses Subcommittee on Arbovirus Laboratory Safety (SALS) entitled *Laboratory Safety for Arboviruses and Certain Other Viruses of Vertebrates in the American Journal of Tropical Medicine and Hygiene*, 29(6), 1980, pp. 1359-1381.

(iv) The Department of Health and Human Services Publication No. (NIH) 76-1165 by the National Cancer Institute (NCI) entitled *Biological Safety Manual for Research Involving Oncogenic Viruses*.

(2) When samples with unidentified viable agents are obtained, a knowledgeable and qualified scientist will evaluate the risks and make recommendations to the safety officer, who will add recommendations for review and approval by the commander or institute director. When guidelines for a specific organism are not established, in addition to these steps, the CDC or SALS or both will be consulted. Their recommendations will be documented and provided to the commander or institute director before approval.

(c) *Selection of facilities.* The facility requirements identified by the risk assessment will be adhered to. Any variations and compensatory measures will be approved by the IBC (when recombinant DNA molecules are involved), the safety officer, and the commander or institute director before a request for an exception or waiver is submitted as stated in AR 385-89.

(d) *Policies and procedures.* Policies in the form of a laboratory safety manual, regulations, memorandums, or SOPs are required for work with etiologic agents in the BDP. Before beginning a new procedure, the policies and procedures will be reviewed to ascertain that the intended operations are described and to determine the requirements that apply to the operation. If procedures exist for the intended operation, personnel will be trained to follow them; if procedures do not exist, then a detailed SOP will be written, reviewed, and approved before beginning the operation. SOPs will conform to the requirements stated in § 627.7(d), and be signed by all personnel who are required to follow the procedures, thus acknowledging that they have read and understood the contents. All SOPs that pertain to a specific area (room, laboratory, or suite) will be available at the worksite.

#### § 627.12 General laboratory techniques.

The general requirements for use of etiologic agents are composed of two sets of requirements, with the requirements for toxins being a subset of the requirements for handling viable

etiologic agents. These requirements are as follows—

(a) *General techniques applicable to etiologic agents.*

(1) A fully fastened long-sleeved laboratory coat, gown, uniform, or coveralls will be worn in laboratories or animal rooms.

(2) Eating, drinking, smoking, and applying cosmetics are not permitted in the work areas.

(3) Personnel must wash their hands after they handle etiologic agents or animals, and before leaving the laboratory area.

(4) Mouth pipetting is strictly prohibited. Mechanical pipetting aids must be used.

(5) *Gloves—*(i) Will be worn when manipulating etiologic agents and handling containers of etiologic agents. Gloves are not required when materials are packaged appropriately for shipment.

(ii) Will be selected based on the hazards.

(iii) Will be changed frequently (or decontaminated frequently), and will be decontaminated or discarded into a labeled biohazard container after each use and immediately upon observable direct contact with an etiologic agent.

(iv) Will be removed at the workspace (workbench or hood) after handling etiologic agents to ensure that doorknobs and other surfaces are not contaminated.

(6) Good housekeeping will be maintained. This includes—

(i) Work areas free of clutter.

(ii) Work environment free of tripping hazards, with adequate access to exits, emergency equipment, controls, and such.

(iii) Benches and general work areas will be cleaned regularly using a wet sponge or similar method with disinfectant as appropriate. Methods that stir up dust such as sweeping or using vacuum cleaners, (except for HEPA-filtered vacuum cleaners) are unacceptable.

(iv) Specific work areas will be cleaned and decontaminated immediately following each use of an etiologic agent (at least once a day) and after any spill of viable material.

(v) Hallways and stairways will not be used for storage.

(7) All solutions, reagents, and chemicals will be labeled.

(8) All contaminated liquid or solid wastes will be inactivated before disposal.

(9) Work will be conducted over spill trays or plastic-backed absorbent paper. The paper will be removed, decontaminated, or disinfected, and the



general area wiped with decontaminant at the end of each day or at the end of the experiment, whichever occurs first.

(10) Etiologic agents will be kept in closed containers when not in use. Cultures, solutions, or dried etiologic agents in glass vessels transported or incubated within a room or suite will be handled in nonbreakable, leak-proof pans, trays, pails, carboys, or other secondary containers large enough to contain all the material, if the glass vessel leaks or breaks. Etiologic agents removed from a room or suite for transport to another approved area within the same building will be placed in a closed unbreakable secondary container before removal from the laboratory. The secondary container will be labeled on the exterior with a biohazard symbol and identification of the contents, including the required biosafety level, the scientific name, the concentration (if applicable), and the responsible individual. The secondary containers will be wiped with suitable disinfectant before removal from the laboratory or area.

(11) Working stocks of etiologic agents will be stored in double containers. The primary and secondary containers will provide a positive seal and the secondary container will be unbreakable. The secondary container will be labeled as stated in § 627.12 (a)(10) and with the date stored.

(12) Storage units (for example, freezers, refrigerators, cabinets, and hoods) will be labeled with the universal biohazard sign and indicate the classes of etiologic agents contained in them. Storage units will be secured when not in use.

(13) All contaminated materials, containers, spills, and solutions will be decontaminated or disinfected by approved methods before disposal.

(14) After injection of an etiologic agent into animals, the site of injection will be swabbed with a decontaminant.

(15) Syringes. (i) Reusable or disposable syringes will be of the fixed needle or LUER-LOK type (or equivalent) to assure that the needle cannot separate during use.

(ii) After use, nondisposable glass syringes with attached needles contaminated with etiologic agents will be submerged in a container of decontaminant. Disposable syringes will be discarded with needles attached in puncture-proof rigid containers. Needles will not be recapped after use.

(iii) Sterilized or decontaminated containers marked "Syringes and/or Needles" may be deposited in appropriate refuse containers after proper packaging and destruction of the contents.

[Note: Many States, especially those on the Eastern seaboard, have implemented strict requirements for the disposal of medical wastes. For example, Maryland has designated all waste from a microbiological laboratory as hazardous waste with licensing requirements for generators of 50 kilograms per month or more of waste, while all medical waste released for transport off-site must be manifested to a State licensed medical waste hauler with the destination specified. Additionally, in some cases, the local government (for example, a city) regulates the disposal of these wastes. These requirements will be identified and followed.]

Needles or syringes may not be destroyed by clipping. A mechanical shear may be used to smash or sheer needles after or concurrently with sterilization or decontamination.

(16) Refrigerators, deep freezers, and dry ice chests should be checked, cleaned out, and defrosted periodically to remove any ampules, tubes, and so forth, containing etiologic agents that may have broken during storage. Rubber gloves and respiratory protection appropriate to the materials in storage should be worn during cleaning. Do not store flammable solutions in nonexplosion proof refrigerators.

(b) *Additional techniques applicable to work with viable etiologic agents.* The major objective of these techniques is to assist in protection against laboratory acquired infections. Air sampling studies have shown that aerosols are generated from most of the manipulations of bacterial and viral cultures common to research laboratories. The generation of aerosols during routine laboratory manipulations must be considered when evaluating the individual degree of risk, keeping in mind the four main factors governing infection: dosage, virulence of the organism, route of infection (for example, skin, eyes, mouth, lungs), and host susceptibility (for example, state of health, natural resistance, previous infection, response to vaccines and toxoids). The requirements stated below are minimum handling requirements to prevent accidental infection created by incidental aerosols.

(1) All procedures are performed carefully to minimize the creation of aerosols.

(2) No infectious mixtures will be prepared by bubbling air through a liquid.

(3) Pipettes.

(i) No infectious material will be forcibly ejected from pipettes. Only to deliver (TD) pipettes will be used.

(ii) Pipettes used with infectious or toxic materials will be plugged with cotton unless they are used exclusively in a gas-tight cabinet system.

(iii) Contaminated pipettes will be placed horizontally in a rigid container containing enough disinfectant for complete immersion. Cylinders used for vertical discard are not recommended. The container and pipettes must be autoclaved as a unit and replaced by a clean container containing fresh disinfectant.

(iv) Pipetting devices must be used. Under no circumstances is mouth pipetting permitted.

(4) Syringes. (i) Using syringes and needles for making dilutions of etiologic agents is not recommended.

(ii) When removing a syringe and needle from a rubber stopper bottle containing viable etiologic agents, an alcohol soaked pledget around the stopper and needle will be used.

(iii) Excess fluid and bubbles should be expelled from syringes vertically into a cotton pledget soaked with disinfectant or into a small bottle containing disinfectant-soaked cotton.

(iv) The site of injection of an animal will be swabbed with a disinfectant before and after injection.

(v) After use, syringes contaminated with residual infectious fluid will be submerged in a container of disinfectant in a safety cabinet prior to removal for autoclaving. To minimize accidental injection of infectious material, the removable needles should remain on such syringes until after autoclaving. When possible, syringes with attached needles should be placed in a pan separate from that holding other discarded materials.

(vi) Caps will not be placed over needles until after disinfection. During recapping, procedures to prevent personal injuries will be used.

(5) Centrifuges and shakers. (i) Before centrifuging, tubes, rotors, seals, and gaskets will be checked for cleanliness and integrity. In low speed clinical-type centrifuges, a germicidal solution may be added between the tube and trunnion cup to disinfect the outer surfaces of both and to cushion against shocks that might break the tube. Metal or plastic tubes (other than nitro-cellulose) will be used.

(ii) Decanting from centrifuge tubes will be avoided. If decanting is necessary, the outer rim will be wiped with a disinfectant after decanting so that material on the lip cannot spin off as an aerosol. Centrifuge tubes will not be filled beyond the level the manufacturer recommends.

(iii) Broth cultures will be shaken in a manner that avoids wetting the plug or cap.

(6) Water baths in which viable etiologic agents are incubated must



contain a disinfectant. For cold water baths, 70 percent propylene glycol is recommended. The disinfectant should be changed frequently.

(7) When a laboratory vacuum is used to manipulate viable etiologic agents, a secondary reservoir containing disinfectant and a HEPA filter must be employed to ensure that the laboratory vacuum lines do not become contaminated.

(8) Test tubes. (i) Tubes containing viable etiologic agents should be manipulated with extreme care. Studies have shown that simple procedures, such as removing a tube cap or transferring an inoculum, can create a potentially hazardous aerosol.

(ii) Manipulation of biohazardous test tubes will be conducted in biological safety cabinets. Tubes and racks of tubes containing biohazardous material should be clearly marked. The individual employee must ensure that tubes containing biohazardous material are properly sterilized prior to disposal or glassware washing. Safety test tube trays should be used in place of conventional test tube racks to minimize spillage from broken tubes. When safety test tube trays are not used, the conventional test tube racks will be placed in a tray large enough to contain any potential spill. A safety test tube tray is one having a solid bottom and sides deep enough to hold all liquids, should a test tube break.

(9) Care should be exercised when using membrane filters to obtain sterile filtrates of viable etiologic agents. Due to the fragility of the membranes and other factors, such filtrates cannot be considered noninfectious until laboratory culture or other tests have proven their sterility.

(10) The preparation, handling, and use of dry powders of viable etiologic agents in open containers presents unusual hazards. The slightest manipulation of such powders can cause the generation of aerosols containing a high concentration of etiologic agents. Therefore, work with dry powders of etiologic agents in open containers should be carried out in gas-tight biological safety cabinets.

#### § 627.13 Biosafety level 1.

(a) *Requirements beyond those for all etiologic agents.* BL-1 operations follow the general techniques described in §§ 627.12(a) and 617.12(b).

(b) *Additional laboratory requirement.* Contaminated materials that are to be decontaminated at a site away from the laboratory are placed in a durable leak-proof container which is closed before being removed from the laboratory. Examples of suitable

containers are metal tubs with lids or plastic bags that are sealed and then placed inside a rigid container for transport.

(c) *Additional animal requirements.*

(1) Bedding materials from animal cages will be removed in such a manner as to minimize the creation of aerosols and disposed of in compliance with applicable institutional or local requirements.

(2) Cages are washed manually or in a cagewasher. Temperature of final rinse water will be a minimum of 180 ° F.

(3) Laboratory coats, gowns, or uniforms worn in animal rooms shall not be worn in other areas.

#### § 627.14 Biosafety level 2.

(a) *Additional requirements.* In addition to the general microbiological techniques stated in § 627.13, BL-2 operations include the following requirements:

(1) When etiologic agents are in use, a hazard warning sign incorporating the universal biohazard symbol is posted on the access door of the work area. The hazard warning sign identifies the etiologic agent, lists the name and telephone number of the institute director or other responsible person(s), and indicates the special requirement(s) for entering the laboratory.

(2) Animals not involved in the work being performed are not permitted in the laboratory.

(3) Special care is taken to avoid skin contamination with the etiologic agents; gloves will be worn when handling etiologic agents or infected animals.

(4) All wastes from laboratories and animal rooms are decontaminated before disposal.

(5) Hypodermic needles and syringes are used only for parenteral injection and aspiration of fluids from laboratory animals and diaphragm bottles.

(6) Spills and accidents which result in a potential exposure to etiologic agents will be reported immediately to the safety officer, the project leader, and the institute director.

(7) Biological safety cabinets (Class I or II) will be used when:

(i) Procedures with a high potential for creating infectious aerosols are conducted.

(ii) High concentrations or large volumes of etiologic agents are used.

(8) Laboratory coats, gowns, smocks, or uniforms will be removed before leaving the animal facility or laboratory area.

(b) *Additional animal requirements.*

(1) Cages must be decontaminated, preferably by autoclaving, before they are cleaned and washed.

(2) Approved molded masks are worn by all personnel entering animal rooms housing nonhuman primates.

(3) If floor drains are provided, the drain traps will be kept filled with water or a suitable disinfectant.

#### § 627.15 Biosafety level 3.

(a) *Additional requirements.* In addition to the requirements stated in §§ 627.13 and 627.14, the following requirements apply—

(1) Approved molded masks or respirators with HEPA filters are worn by all personnel in rooms housing infected animals.

(2) Protective clothing worn in a laboratory or animal room will be removed before exiting the laboratory or animal room.

(3) Clothing worn in laboratories and animal areas to protect street clothing will be decontaminated before being laundered.

(b) *Additional laboratory requirements.* (1) Laboratory doors will be kept closed.

(2) All activities involving etiologic agents will be conducted in biological safety cabinets (Class I, II, or III) or other physical containment devices within the containment module. No work in open vessels is conducted outside a biological safety cabinet.

(3) The work surfaces of biological safety cabinets and other containment equipment will be decontaminated after work with etiologic agents. Plastic-backed paper toweling should be used on nonperforated work surfaces within biological safety cabinets to facilitate clean-up.

(c) *Additional animal requirements.* (1) Cages are autoclaved before bedding is removed and before they are cleaned and washed.

(2) Gloves are removed aseptically and autoclaved with other wastes before being disposed of or reused.

(3) Boots, shoe covers, or other protective footwear and disinfectant foot baths must be available and used when indicated.

(4) Personal protective clothing and equipment and other physical containment devices are used for all procedures and manipulations of etiologic agents or infected animals. The risk of infectious aerosols from infected animals or their bedding shall be reduced by housing animals in partial containment caging systems as described in § 627.56.

(d) *Work with BL-3 etiologic agents that require additional secondary containment.* Facilities in which work with certain viruses, for example, Rift Valley fever, yellow fever, and



Venezuelan equine encephalitis, is conducted require HEPA filtration of Xallexhaust air prior to discharge from the laboratory. All persons working with those agents for which a vaccine is available should be immunized.

#### § 627.16 Biosafety level 4.

Laboratory work at BL-4 must follow the requirements stated in §§ 627.13, 627.14 and 627.15 as well as the following:

(a) All activities are conducted in Class III biological safety cabinets or in Class I or II biological safety cabinets in conjunction with a one-piece positive pressure personnel suit ventilated by a life-support system.

(b) Biological materials to be removed from the Class III cabinet or from the maximum containment laboratory in a viable or intact state must be transferred to a sealed nonbreakable primary container, enclosed in a nonbreakable sealed secondary container, and removed from the facility through a disinfectant dunk tank, fumigation chamber, or an airlock designed for this purpose.

(c) No materials, except for biological materials that are to remain in a viable or intact state, are removed from the maximum containment laboratory unless they have been autoclaved or decontaminated before they leave the facility. Equipment or material which might be damaged by high temperature or steam is decontaminated by gaseous or vapor methods in an airlock or chamber designed for this purpose.

(d) Personnel may enter and leave the facility only through the clothing change and shower rooms. Personnel must shower each time they leave the facility. Personnel may use the airlocks to enter or leave the laboratory only in an emergency.

(e) Street clothing must be removed in the outer clothing change room and kept there. Complete laboratory clothing, including undergarments, pants and shirts or jumpsuits, shoes, and gloves, will be provided and must be used by all personnel entering the facility. Head covers are provided for personnel who do not wash their hair during the shower. When leaving the laboratory area, personnel must remove their laboratory clothing and store it in a locker or hamper in the inner change room.

(f) When etiologic agents or infected animals are present in the laboratory or animal rooms, a hazard warning sign incorporating the universal biohazard symbol must be posted on all access doors. The sign must identify the agent, list the name of the commander or

institute director or other responsible person(s), and indicate any special requirements for entering the area (for example, the need for immunizations or respirators).

(g) Supplies and materials needed in the facility are brought in by way of the double-doored autoclave, fumigation chamber, or airlock which is appropriately decontaminated after each use. After securing the outer doors, personnel within the facility retrieve materials by opening the interior doors of the autoclave, fumigation chamber, or airlock. These doors are secured after materials are brought into the facility.

(h) Materials (for example, animals and clothing) not related to the experiment being conducted are not permitted in the facility.

(i) Whenever possible, avoid using any glass items.

#### § 627.17 Toxins.

The laboratory facilities, equipment, and procedures appropriate for work with toxins of biological origin must reflect the intrinsic level of hazard posed by a particular toxin as well as the potential risks inherent in the operations performed. All toxins must be considered to pose a hazard in an aerosol form. However, most toxins exert their effects only after parenteral exposure or ingestion, and a few toxins present a dermal hazard. In general, toxins of biological origin are not intrinsically volatile. Thus, the laboratory safety precautions appropriate for handling these materials closely parallel those for handling infectious organisms. The requirements in this section for the laboratory use of toxins of biological origin include the requirements in § 627.12(a) and the following:

(a) *Vacuum lines.* When vacuum lines are used with systems containing toxins, they will be protected with a HEPA filter to prevent entry of toxins into the lines (or sink drains when water aspirators are used).

(b) *Preparation of concentrated stock solutions and handling closed primary containers of dry toxins.* Preparation of primary containers of toxin stock solutions and manipulations of closed primary containers of dry forms of toxins will be conducted—

(1) In a chemical fume hood, a glove box, or a biological safety cabinet or equivalent containment system approved by the safety officer.

(2) While wearing eye protection if using an open-fronted containment system.

(3) Ensuring that gloves worn when handling toxins will be disposed of as

toxin waste, with decontamination if required.

(4) With the room door closed and posted with a universal biohazard sign, or other sign, indicating that toxin work is in progress. Extraneous personnel shall not be permitted in the room during operations.

(5) Ensuring that toxins removed from hoods or biological safety cabinets are double-contained during transport.

(6) After verification of hood or biological safety cabinet inward airflow is made by the user before initiating work.

(7) Within the operationally effective zone of the hood or biological safety cabinet.

(8) Ensuring that nondisposable laboratory clothing is decontaminated before release for laundering.

(9) Ensuring that all individuals who handle toxins wash their hands upon each exit from the laboratory.

(10) With two knowledgeable individuals present whenever more than an estimated human lethal dose is handled in a syringe with a needle. Each must be familiar with the applicable procedures, maintain visual contact with the other, and be ready to assist in the event of an accident.

(c) Manipulations with open containers of dry forms of toxins. Handling dry forms of toxins in uncovered containers (for example, during weighing) will be performed following the requirements stated in §§ 627.12(a), 627.17 (a) and (b), and the following:

(1) Manipulations will be conducted in a HEPA filtered chemical fume hood, glove box, or biological safety cabinet. In addition the exhaust may be charcoal filtered if the material is volatile.

(2) When using an open-fronted fume hood or biological safety cabinet, protective clothing, including gloves and a disposable long-sleeved body covering (gown, laboratory coat, smock, coverall, or similar garment) will be worn so that hands and arms are completely covered. Eye and approved respiratory protection is also required. The protective clothing will not be worn outside of the laboratory and will be disposed of as solid toxin waste.

(3) Before containers are removed from the hood, cabinet, or glove box, the exterior of the closed primary container will be decontaminated and placed in a clean secondary container.

(4) When toxins are in use, the room will be posted to indicate "Toxins in Use—Authorized Personnel Only." Any special entry requirements will be posted on the entrance(s) to the room.



(5) All operations will be conducted with two knowledgeable individuals present. Each must be familiar with the applicable procedures, maintain visual contact with the other, and be ready to assist in the event of an accident.

(6) Individuals handling toxins will wash their hands upon leaving the laboratory.

(d) Additional considerations of specific toxin properties. The following requirements are in addition to the requirements stated in the paragraphs above. Determine whether the material fits § 627.17 (b) or (c), and complies with the appropriate section and the following when applicable:

(1) When handling dry forms of toxins that are electrostatic—

(i) Do not wear gloves (such as latex) that help to generate static electricity.

(ii) Use glove bag within a hood or biological safety cabinet, a glove box, or a class III biological safety cabinet.

(2) When handling toxins that are percutaneous hazards (irritants, necrotic to tissue, or extremely toxic from dermal exposure)—

(i) Gloves will be selected that are known to be impervious to the toxin and the diluent (when applicable) for the duration of the manipulations.

(ii) Disposable laboratory clothing will be worn, left in the laboratory upon exit, and disposed of as solid toxin waste.

(e) Aerosol exposures. The requirements found in § 627.17 (a) and (b) will be complied with plus the following:

(1) Chambers, nose-only exposure apparatus, and generation system must be placed inside a fume hood, glove box, or a Class III biological safety cabinet. Glove boxes and Class III biological safety cabinets will have HEPA filters on both inlet and outlet air ports.

(2) The atmosphere from within the exposure chamber will be HEPA filtered before release inside the hood, glove box, or cabinet.

(3) All items inside the hood, glove box, or Class III biological safety cabinet will be decontaminated upon removal. Materials such as experimental samples that cannot be decontaminated directly will be placed in a closed secondary container, the exterior of which will be decontaminated and labeled appropriately. Animals will have any areas exposed to toxin wiped clean after removal from the exposure apparatus.

(4) The interior of the hood, glove box, or cabinet containing the chamber and all items will be decontaminated periodically, for example, at the end of a series of related experiments. Until decontaminated, the hood, box, or cabinet will be posted to indicate that

toxins are in use, and access to the equipment and apparatus restricted to necessary, authorized personnel.

#### § 627.18 Emergencies.

(a) Introduction. All laboratories will establish specific emergency plans for their facilities. Plans will include liaison through proper channels with local emergency groups and with community officials. These plans will include both the building and the individual laboratories. For the building, the plan must describe evacuation routes, facilities for medical treatment, and procedures for reporting accidents and emergencies. The plans will be reinforced by drills. Emergency groups and community officials must be informed of emergency plans in advance of any call for assistance. See AR 385-69.

(b) General emergency procedures. The following emergency procedures will be followed for laboratory accidents or incidents—

(1) Using appropriate personal protection, assist persons involved, remove contaminated clothing if necessary, decontaminate affected areas, and remove personnel from exposure to further injury if necessary; do not move an injured person not in danger of further harm. Render immediate first aid if necessary.

(2) Warn personnel in adjacent areas of any potential hazards to their safety.

(3) In case of fire or explosion, call the fire department or community fire brigade immediately. Follow local rules for dealing with incipient fire. Portable fire extinguishers will be made available with instructions for their use. Fire fighters responding to the fire scene will be advised to wear a self-contained positive pressure breathing apparatus to protect themselves from toxic combustion by-products.

(4) Laboratories must be prepared for problems resulting from severe weather or loss of a utility service. In the event of the latter, most ventilation systems not supplied with emergency power will become inoperative. All potentially hazardous laboratory work must stop until service has been restored and appropriate action has been taken to prevent personnel exposure to etiologic agents.

(5) In a medical emergency, summon medical help immediately. Laboratories without a medical staff must have personnel trained in first aid available during working hours.

(6) For small-scale laboratory accidents, secure the laboratory, leave the area, and call for assistance.

(7) When handling mixed hazards (for example, a substance or mixture that

may be infectious and radioactive, or infectious and chemically toxic), respond with procedures addressing the greater hazard first, and then follow through with those for the lesser hazards to ensure that all appropriate steps have been taken.

(c) *Evacuation procedures.* Building and laboratory evacuation procedures will be established and communicated to all personnel.

(1) Emergency alarm system. (i) There will be a system to alert personnel of an emergency that requires evacuation of the laboratory or building. Laboratory personnel must be familiar with the location and operation of alarm equipment.

(ii) Isolated areas (for example, cold, warm, or sterile rooms) will be equipped with an alarm or communication system that can be used to alert others outside to the presence of a worker inside, or to warn workers inside of an emergency that requires evacuation.

(2) Evacuation routes will be established and an outside assembly area for evacuated personnel must be designated. All individuals should be accounted for.

(3) Shut-down and start-up procedures.

(i) Guidelines for shutting down operations during an emergency evacuation will be available in writing. Those guidelines will include procedures for handling any power failure emergency.

(ii) Written procedures will also be provided to ensure that personnel do not return to the laboratory until the emergency is ended. Those procedures must also contain start-up operations for the laboratory.

(iii) All shut-down and start-up procedures will be available to personnel and reviewed semiannually.

(4) All aspects of the building evacuation procedure will be tested semiannually with practice drills.

(d) *Spills.* (1) All areas where work with etiologic agents is performed will have designated personnel to respond to a spill and provide protective apparel, safety equipment, and materials necessary to contain and clean up the spill. Protective clothing requirements are described in § 627.21. Also, there will be supplies on hand to deal with the spill consistent with the hazard and quantities of the spilled substance.

(2) The safety officer will be notified immediately of all spills. The first line supervisor will ensure that proper clean-up techniques are employed.

(3) Etiologic agents. (i) A program for responding to spills of etiologic agents will be developed and implemented.



This program will contain emergency response procedures for a biological spill, which will be tailored to the potential hazard of the material being used, the associated laboratory reagents involved, the volume of material, and the location of the materials within the laboratory. Generally, the spill should be confined to a small area while minimizing the substance's conversion to an aerosol. The spill will be chemically decontaminated or neutralized, followed by a cleanup with careful disposal of the residue. If the spilled material is volatile and noninfectious, it may be allowed to evaporate but must be exhausted by a chemical hood or ventilation system.

(ii) When a mishap occurs that may generate an aerosol of etiologic agents requiring BL-2 (or higher) containment, the room must be evacuated immediately, the doors closed, and all clothing decontaminated, unless the spill occurs in a class II or class III biological safety cabinet. Sufficient time must be allowed for the droplets to settle and the aerosols to be reduced by the air changes of the ventilation system before decontaminating the area. The area will then be decontaminated to prevent exposure to the infectious agents or toxic substances. Reentry procedures to perform the decontamination will conform to § 627.18(e).

(iii) A spill of biohazardous material within a biological safety cabinet requires a special response and cleanup procedure. Cleanup will be initiated while the cabinet continues to operate, using an effective chemical decontaminating agent. Aerosol generation during decontamination and the escape of contaminants from the cabinet must be prevented. Caution must be exercised in choosing the decontaminant, keeping in mind that fumes from flammable organic solvents, such as alcohol, can reach dangerous concentrations within a biological safety cabinet.

(4) Combined radioactive and biological spills. (i) Both the radiation protection officer (RPO) and the safety officer must be notified immediately whenever there is a spill of radioactive biological material, regardless of its size. Laboratory personnel may be expected to clean up the spill. The RPO will direct the cleanup, in accordance with the NRC license for the facility.

(ii) The spill will be cleaned up in a way that minimizes the generation of aerosols and spread of contamination. All items used in cleaning up the spill must be disposed of as radioactive waste.

(iii) Following cleanup, the area, affected protective clothing, and all

affected equipment and supplies must be surveyed for residual radioactive contamination. All potentially affected areas and items that are not disposable will be wipe-tested to verify that unfixed radioactive contamination has been removed. If fixed contamination is found, the RPO will determine the requirements for additional cleanup.

(e) *Reentry procedures.* This section applies when reentry is necessary to clean up a spill outside of a hood or biological safety cabinet, or to decontaminate or service engineering controls that have failed or malfunctioned so that they do not provide the required containment.

(1) When agents requiring BL-1 or BL-1 LS containment are involved, the clothing requirements stated in § 627.30 (a) or (b) as appropriate will be followed. Individuals will remove the required protective clothing when finished and wash their hands before proceeding to other tasks.

(2) When agents requiring BL-2, BL-2 LS, or toxin procedures and containment are involved, personnel will be required to wear the clothing described in § 627.30 (c) or (d) as appropriate. Outer protective clothing will be removed and left in the room before exiting and personnel will wash their hands before proceeding on to other activities.

(3) When agents requiring BL-3, or BL-3 LS containment are involved, containers for sealing up inner protective clothing and decontaminant will be placed at the room exit. Personnel will be required to wear the clothing described in paragraph 4-10e. When exiting the area after decontamination procedures, individuals will remove their outer layer of protective clothing just before exiting the room. Once outside the room, the inner layer of protective clothing (for example, coverall) will be removed and placed in the container and the inner gloves will be decontaminated before being removed and placed in the container. Personnel will proceed directly to the shower facility to take a complete shower before exiting the facility.

(4) When agents requiring BL-4 containment are involved, the following applies as appropriate to the type of BL-4 facility:

(i) When a spill requiring clean-up is in an area designed for use with personal positive pressure suits, the entry and exit procedures will be those normally required to enter or exit the area.

(ii) When entering a nonsuit area where a spill of etiologic agent has occurred outside the containment of a Class III biological safety cabinet,

personnel will wear the clothing as described in § 627.30(f). Before entry, decontamination areas will be established. To accomplish this, two step-in decontamination pans with the appropriate disinfectant will be set up [one just inside the room (where the contamination exists) and the second immediately outside the room]. Immediately outside the room, there will also be a sealable container suitable for sealing up the suit and any air lines (if used).

(iii) When exiting the room, suited individuals will place all equipment and other items in autoclaves or disinfectant, step into the disinfectant pan, and wash down the exterior of their suits with appropriate disinfectant. When completed, the door to the room will be opened and the individual will step through the doorway into the second disinfectant pan. The suit will be thoroughly rinsed with disinfectant again before moving toward the exit from the facility. The suit (but not the respirator) will be placed in the provided container. The individual will proceed through another doorway before removing the respirator and placing it in a closed container for decontamination. The individual will then proceed directly to the shower area and take a full shower before exiting the area. In case they are needed, personnel will be standing by ready to render assistance. Suited individuals will be visually observed, if possible. When visual observation is not possible, a communications system is required.

(f) *Mishap reports and investigations.*

(1) Each institution must have a defined system for reporting laboratory injuries, illnesses, and mishaps, as well as for investigating them. These events will be documented and reported to the appropriate safety, supervisory, and occupational health personnel. Those organizations subject to the regulations promulgated by the OSHA will follow the specific requirements for reporting injuries in the work place contained in those regulations. The requirements stated in AR 385-69, State, and local government requirements for similar reporting will be followed.

(2) Form(s) for recording mishaps will be available and completed for all laboratory mishaps. Those reports must include a description of the mishap and any factors contributing to it. In addition, a description of any first aid or other health care given to the employee will be included. Responsibility for completing these forms must be clearly defined in the facility safety manual. Mishaps will be reviewed periodically by the safety officer, the safety



committee, the employee health unit, or other appropriate personnel. Individual reports or a summary must be sent, along with recommended changes in laboratory procedure or policy, to the commander or institute director. Policy or procedural changes must be implemented if deemed necessary by the commander or institute director.

(3) Any mishaps with etiologic agents used under sponsorship of the BDP that result in sero-conversion or a laboratory-acquired illness will be reported.

#### § 627.19 Large-scale operations.

(a) *Large-scale.* In addition to the requirements stated in § 627.13, the following applies to research or production activities involving viable etiologic agents in quantities greater than 10 liters:

(1) All large-scale operations will be conducted in facilities described in § 627.47.

(2) Cultures will be handled in a closed system.

(3) Sample collection, the addition of materials, and the transfer of culture fluids shall be done in a manner which minimizes the release of aerosols or contamination of exposed surfaces.

(4) A closed system or other primary containment equipment that has contained viable organisms shall not be opened for maintenance or other purposes unless it has been sterilized.

(5) SOPs will include a section describing and requiring a validation of the process equipment's proper function.

(6) Scientists, technicians, equipment workers, and support personnel with access to the large-scale production area during its operation will be included in the medical surveillance program.

(b) *BL-2—LS.* In addition to the requirements stated in §§ 627.19(a) and 627.14, the following procedures will be employed for BL-2—LS:

(1) Rotating seals and other mechanical devices directly associated with the closed system used for the propagation and growth of viable organisms shall be designed to prevent leakage or shall be fully enclosed in ventilated housings that are exhausted through filters which have efficiencies equivalent to HEPA filters or through other equivalent treatment devices.

(2) A closed system used for the propagation and growth of viable organisms and other primary containment equipment used to contain operations involving viable organisms shall include monitoring or sensing devices that monitor the integrity of containment during operations.

(3) Systems used to propagate and grow viable organisms shall be

permanently identified. This identification shall be used in all records reflecting testing, operation, and maintenance and in all documentation relating to the use of this equipment.

(c) *BL-3—LS.* In addition to the requirements stated in §§ 627.19(a) and 627.14, the following procedures apply:

(1) Personnel entry into the controlled area shall be through the entry area specified in § 627.47(c)(1).

(2) Persons entering the controlled area shall exchange or cover their personal clothing with work garments such as jumpsuits, long sleeved laboratory coats, pants and shirts, head cover, and shoes or shoe covers. On exit from the controlled area, the work clothing may be stored in a locker separate from that used for personal clothing, or discarded for laundering. Clothing shall be decontaminated before laundering.

(3) Entry into the controlled area during periods when work is in progress shall be restricted to those persons required to meet program support needs.

(4) Prior to entry, all persons shall be informed of the operating practices, emergency procedures, and the nature of the work conducted.

(5) The universal biohazard sign shall be posted on entry doors to the controlled area and all internal doors. The sign posted on the entry doors to the controlled area shall include a statement of agents in use and personnel authorized to enter.

(6) Equipment and materials required for the management of accidents involving viable organisms shall be available in the controlled area.

(d) *BL-4—LS.* Guidelines for these operations are not established. If these are needed, they must be established by the United States Army Surgeon General or the NIH on an individual basis.

#### § 627.20 Operations with radioactive material.

Operations that combine etiologic agents with radioactive material present unique problems. When this is the case, the following apply:

(a) *Radiation program.* A radiation program meeting the requirements of AR 385-11 and NRC licensing that allows the particular isotope and its use are required. The requirements for acquisition, handling procedures, labeling, storage, training, monitoring, and disposal will be described in an organization policy document.

(b) *Procedure approval.* In addition to the required approvals for work with etiologic agents, the RPO will approve all SOPs involving the use of radioactive materials. Laboratory operators must be fully trained, with annual training

updates as required by the existing license.

(c) *Special situations.* (1) The laboratory waste must be segregated as radioactive waste and disposed of as such after it has been decontaminated. Do not mix nonradioactive waste with radioactive waste as the disposal of radioactive waste is much more complex and expensive. When RCRA-listed chemicals are mixed with radioactive waste, it becomes "mixed waste" for which there is currently no means of disposal.

(2) Activities conducted with radioisotopes should be confined to the smallest number of areas or rooms consistent with requirements.

(3) Decontamination methods specific to etiologic agents will not always remove radioactivity. Other methods, such as specialized detergents and solvents designed for this use, should be employed to remove residual radioactivity.

#### Subpart D—Personal Protective Equipment

##### § 627.21 Introduction.

Personal protective equipment (PPE) includes clothing and equipment used to protect the laboratory worker from contact with infectious, toxic, and corrosive agents, as well as excessive heat, fire, and other physical hazards. The appropriate PPE for any activity depends upon the proposed operations and the potential hazards associated with them. While PPE is an important item of personal protection, it serves as only a secondary line of protection against hazards in the workplace. Engineering controls (subpart H), combined with common sense, good laboratory techniques, and adherence to SOPs, are the primary barriers to exposure. There are some situations, however, in which it is either impractical or impossible to rely exclusively on engineering controls. In these cases, PPE may form the primary barrier between personnel and the hazardous or infectious materials.

##### § 627.22 Minimum laboratory attire for use of etiologic agents.

Individuals required to wear PPE will be trained in its proper use. The PPE listed below is the minimum required when etiologic agents are handled at any biosafety level. Research with etiologic agents usually involves hazards other than those presented by the agents themselves. When PPE is selected, the hazards presented by these other factors must be considered regardless of the biosafety level used.



For example, toxic chemicals are commonly used in research involving etiologic agents. The processes may expose personnel to physical hazards, such as heat or animal bites, and the decontamination process may involve the handling of toxic or corrosive materials. When the PPE required to mitigate these hazards exceeds that of the minimum requirements, the necessary PPE will be selected considering all the hazards. Information regarding the additional appropriate PPE worn to protect against these hazards will be available from one of the following sources: MSDS, SOP for the operation, or the safety officer.

Deviations from the standards stated in approved SOPs must be approved by the safety officer. All laboratory coats worn to protect the individual should be left in the laboratory when that individual leaves. In each case, the minimum attire will be—

(a) *Laboratory workers.* Street attire is permissible in the laboratory, but must include closed-toe shoes. A full-length, long sleeved, fully fastened laboratory coat, gown, or smock will be worn over the street attire in the laboratory at all times. The laboratory clothing will be removed and left in the laboratory when leaving to enter nonlaboratory use areas.

(b) *Animal caretakers.* In addition to the clothing requirements in § 627.22(a), animal handlers will be provided with safety shoes or safety boots. The requirements of § 627.22(b) should also apply.

(c) *Nonhuman primate rooms.* Personnel entering rooms housing nonhuman primates will wear the clothing stated in § 627.22(a) and, if applicable, § 627.22(b) in addition to a molded mask or HEPA filtered respirator, latex or vinyl gloves, and eye protection.

#### § 627.23 Biosafety level 1.

This level requires only the minimum attire described in § 626.22.

#### § 627.24 Biosafety level 2.

This level requires the following additions to the minimum clothing specified in § 627.22:

(a) *Laboratory.* Gloves (type dependent on the application) will be worn when handling etiologic agents or containers of etiologic agents and when handling infected animals.

(b) *Animal rooms.* (1) Protective clothing will be changed completely every day. One- or two-piece laboratory suits or solid-front gowns and wrap-around smocks are preferable. Full-length, long-sleeved, fully fastened laboratory coats are allowed.

(2) Eye protection must be worn when handling nonhuman primates.

(3) Appropriate gloves must be worn.

(4) Molded masks or HEPA filtered respirators will be worn in rooms housing nonhuman primates.

#### § 627.25 Biosafety level 3.

The outer clothing worn in these facilities must never be worn outside the facility. Color-coded clothing that is worn only in the facility is recommended to remind individuals not to wear it outside. The minimum clothing includes—

(a) *Laboratory.* (1) Long-sleeved, solid front, or wraparound gowns, scrub suits, or coveralls over street attire which includes closed-toe shoes. Dedicated shoes, boots, or shoe covers will be worn in the facility.

(2) *Appropriate gloves.*

(b) *Animal rooms.* (1) A complete change of protective clothing on a daily basis. Long-sleeved one- or two-piece solid front uniforms, solid-front gown, wrap-around smocks, or solid front coveralls.

(2) Eye protection must be worn when handling nonhuman primates.

(3) Molded masks or HEPA filtered respirators will be worn in rooms housing infected animals.

(4) Shoe covers will be worn and removed before exiting the room; alternatively, disinfectant footbaths will be used for each exit from the room when infected animals are present.

#### § 627.26 Biosafety level 4.

Street clothing must be removed in an outer clothing change room and kept there. Clothing worn in the facility will be removed in an inner change room and a shower taken before replacing the street clothing. Two distinct PPE requirements exist for BL-4 operations:

(a) *Class III biological safety cabinet containment.* Clothing requirements when all etiologic agents and infected animals are housed and manipulated in Class III biological safety cabinets will include—

(1) Complete change of clothing and wet shower upon exit. This includes undergarments, pants and shirts or jump-suits, and shoes. While it is preferred that the shower include washing the hair, head covers will be worn by those who do not wash their hair on each exit.

(2) Appropriate inner gloves. The inner gloves will be donned in the change room.

(b) *Class I or II biological safety cabinet containment.* Clothing requirements for this level when etiologic agents are contained in Class I or II biological safety cabinets of

equivalent partial-containment caging systems (for infected animals) (See §§ 627.56 and 627.57) include—

(1) Complete change of clothing and wet shower upon exit. This includes undergarments, pants and shirts or jump-suits, and shoes. While the shower should include washing the hair, head covers will be worn by those who do not wash their hair on each exit.

(2) Appropriate inner gloves will be donned in the change room.

(3) A one-piece positive pressure suit described in § 627.31(g).

(4) Impervious boots fitted over the suit.

#### § 627.27 Large-scale (LS) operations.

The clothing requirements for these are the same as for the corresponding biosafety levels for laboratory operations.

#### § 627.28 Solutions of toxins and dry forms of toxins in closed containers.

In addition to the minimum clothing specified in § 627.22, disposable gloves or gloves designed to protect against the diluent will be worn when handling these materials.

#### § 627.29 Dry forms of toxins handled in open containers.

In addition to the requirements stated in § 627.28, the requirements stated in § 627.18(c) apply.

#### § 627.30 Situations specified in § 627.18(e).

The clothing requirements for this section are for the emergency procedures specified in § 627.18(e). Because situations can occur and there is no feasible or available means to mitigate the potential hazard adequately by engineering controls, the clothing requirements exceed those required for a properly conducted laboratory operation at an equivalent biosafety level. The protective equipment required will be selected based upon an assessment of the potential hazards that could be encountered. The following clothing requirements are given as a guide. The selection of PPE will be based upon the highest possible level of contamination that could exist in the room. This will be based upon what is known about the operations that were conducted in the room during and prior to the current incident. In each situation, the aerosols will be allowed to dissipate or settle before entry (approximately 30 minutes). The following clothing requirements apply to these situations:

(a) *BL-1.* (1) Gloves.

(2) Outer complete covering such as a pair of coveralls.

(3) Shoe covers, provided shoes, or safety shoes or boots.



(4) Eye protection (maintenance only).  
 (b) *BL-1 LS*. The same as described in section 627.30(a) with the following additions:

- (1) An impervious apron.
- (2) Impervious boots.
- (c) *BL-2 and toxins*. (1) Gloves.
- (2) Full outer covering such as a coverall.

(3) Shoe covers, provided shoes, or safety shoes or boots (maintenance).

(4) An approved half-face or full-face respirator with HEPA filters (worn).

(5) Eye protection.

(6) An impervious apron (not required for entry only).

(d) *BL-2 LS*. The same as § 627.30(c) with the addition of impervious boots.

(e) *BL-3 and BL-3 LS*. (1) A complete change of clothing.

(2) Gloves.

(3) An approved full-face HEPA or HEPA plus charcoal filtered respirator.

(4) An impervious apron (not required for entry only).

(5) Impervious boots.

(6) Head cover.

(f) *BL-4*.

(1) A full change of inner clothing.

(2) An inner pair of gloves.

(3) A one-piece positive pressure suit as described in § 627.31(g), or a one-piece Xsuit with an approved positive pressure self-contained breathing apparatus (SCBA) and an supplied-air respirator (SAR) or both (see § 627.31(f)).

(4) Appropriate gloves fitted to the suit.

(5) Impervious boots fitted over the suit.

#### § 627.31 Specific requirements for individual PPE items.

(a) *Aprons*. Simple plastic or rubber aprons.

(b) *Boots*. When boots must be worn with an apron, the apron should cover the boot tops sufficiently so that liquids splashed on the apron will not run into the boots.

(c) *Eye and face protection*. Eye protection will meet or exceed the requirements of OSHA found in the 29 CFR 1910.133 and will be worn at all times when required. Special eye wear may be required around ultraviolet (UV) light source.

(d) *Gloves*. (1) No one glove will be satisfactory for all applications. Gloves are fabricated in a wide assortment of materials. The type of glove selected will depend upon the specific activity. The various activities in biocontainment facilities call for gloves to protect against etiologic agents in situations where micro-manipulations are required and excellent tactile feed-back through gloves is important, gloves for handling

hot glassware and cryogenic materials, and gloves to protect against animal bites, toxic substances, chemical carcinogens, solvents, acids, and caustics. Many of these requirements call for gloves distinctly different from gloves suitable for the other hazards. As a result, the SOP for each operation should address these hazards and specify the appropriate glove required for each operation. Consult MSDSs, manufacturer glove charts, and the safety officer to determine the correct glove type needed.

(2) Before donning a pair of gloves, examine them closely to ascertain that they are in serviceable condition. Check for rips and pin holes. Gloves should over-wrap the cuff and lower sleeve of the laboratory garment.

(3) Operations in open-front biological safety cabinets should be planned so that once the operator has inserted gloved hands into the cabinet, he or she does not have to withdraw them from the cabinet until the work has been completed. If gloves become visibly contaminated, they will be removed and decontaminated. Additional gloves should be available so that work can continue. When wearing gloves for an extended period, change them periodically or decontaminate them. Individual SOPs will designate the appropriate period based upon the hazards.

(4) Gloves will be removed before going from one level of containment to another (remove gloves in a safety cabinet before removing your hands from the cabinet). Take care to ensure that skin is not touched with the outer surface of contaminated or potentially contaminated gloves when they are removed. Gloves will be placed in suitable decontaminant when they are removed. Disposable gloves will be placed in a covered container for decontamination or disposal.

(5) Gloves that are a part of a biological safety cabinet system will be examined initially, after each sterilization of the biological safety cabinet system, and at least annually for leaks using the soap bubble test, followed by the halo-carbon test. Gloves will be tested while still attached to the cabinet.

(6) Sterilization of nondisposable gloves either before use or before reuse is usually done with ethylene oxide or formaldehyde gas. Sterilized gloves must be aerated in flowing sterile (filtered) air at 21 °C or higher for a minimum of 24 hours prior to use to prevent skin burns and irritation from residual decontaminants.

(e) *Laboratory clothing*. Users will check clothing before wearing it, to

ensure that it is free from defects that would compromise its usefulness. Laboratory clothing (except BL-1) will be decontaminated before being released for laundering by untrained or unprotected personnel. Protective laboratory clothing that requires the wearer to pull it over the head will not be used. Laboratory clothing will meet OSHA requirements found in the 29 CFR 1910.132.

(f) *One-piece suits*. One-piece suits with a respirator under the suit are not used to any great extent except in certain emergencies. The respirators used with these are supplied air by an approved positive pressure SCBA or SAR. Respirators will be of the pressure-demand or constant flow type. The air provided will meet OSHA requirements found in the 29 CFR 1910.134, the requirements of Grade D breathing air as specified in the Compressed Gas Association pamphlet G-7.1 and American National Standards Institute (ANSI) Z86.1-1973. When used in an area that does not have a chemical shower to decontaminate the suit, a decontamination station will be set up for this purpose. Suits maintained for emergency use will be inspected at least quarterly and respiratory equipment will be inspected monthly.

(g) *One-piece positive pressure suits*. A life-support system will be provided with alarms and emergency backup breathing tanks. The air provided will be HEPA-filtered meeting OSHA requirements found in the 29 CFR 1910.134, the requirements of Grade D breathing air as specified in the Compressed Gas Association pamphlet G-7.1 and ANSI Z86.1-1973. A HEPA filter will be in-line between the disconnect on the suit and the breathing space in the suit. When these are used in other than an emergency situation, a chemical shower must be provided to decontaminate the surfaces of the suit as the worker leaves the containment area. Suits will be inspected before each use to check for indications of significant wear or leakage. The suits will be worn with impervious boots over the foot area of the suit and the outer gloves will be attached over the hand portion.

(h) *Respiratory protection equipment*. (1) Respirators and their use will be approved by the safety officer. The selection will be based on the conditions of the activities and the risks involved. In general, National Institute for Occupational Safety and Health (NIOSH) approved respirators that use aerosol filters for dusts and fumes having a Threshold Limit Value (TLV) of less than 0.05 mg/m<sup>3</sup> have been found



acceptable for use in microbiological laboratories. Alternatively, the Army M-17 or M-9 masks may be used. Air-supplied hoods are used in situations where greater respiratory protection is required without the need for body protection. One-piece suits are used when total body and respiratory protection are required.

(2) When respirators are used, a respirator protection program will be established that conforms to AR 11-34 and OSHA standards in the 29 CFR 1910.134. In general, a medical authority will designate who is to wear respirators, they will be fitted by individuals trained in their use and limitations, and wearers will be responsible for the proper storage and regular inspection of their assigned respirators. Air-purifying respirators will not be worn in oxygen deficient environments.

(3) Reusable respirators that have been worn in a contaminated area will be decontaminated before reuse. At the end of each workday when a respirator has been worn in an area where it was required, the wearer will wipe it down with an appropriate liquid decontaminant. A damp cloth soaked in the decontaminant, with the excess liquid squeezed out, will be used for the wipe-down process, taking care to ensure that all crevices are reached. The respirator will be rinsed with clean, warm water. Visibly contaminated respirators will be decontaminated and discarded.

(4) Respirator programs will comply with AR 385-10 and AR 11-34.

(i) *Shoes.* All shoes specially issued for use in controlled access areas should be identified so that they can be segregated from other areas. Safety shoes or boots meeting OSHA requirements stated in the 29 CFR 1910.134 will be issued wherever heavy items or corrosive chemicals are handled. These will be sterilized appropriately after visible contamination. In certain situations (excluding BL-4 operations), it is desirable to wear disposable booties over street shoes, especially when product protection is required.

#### Subpart E—Decontamination and Disposal

##### § 627.32 Introduction.

All material or equipment that is potentially contaminated with etiologic agents must be rendered nonhazardous before disposal. This chapter describes the acceptable physical and chemical decontamination methods and the general applicability of each. In general, all infectious materials and all

contaminated equipment or apparatus will be sterilized before being washed and stored or discarded.

##### § 627.33 Methods of decontamination.

(a) *Autoclave.* The use of wet heat is the most dependable procedure for destroying all forms of microbial life. An autoclave employs saturated steam under a pressure of approximately 15 pounds per square inch (psi) to achieve a chamber temperature of at least 121 °C for a minimum of 15 minutes. The time is measured after the temperature of the material being sterilized reaches 121 °C. Other combinations of temperature and pressure (some of which are dependent on the equipment used) can be used to accomplish sterilization provided that the efficacy of sterilization is validated as described below. The most critical factor in ensuring the reliability of this sterilization method, other than proper temperature, is preventing entrapped air that is not replaced by steam. Material to be autoclaved must come in contact with steam and heat and, as a result, it may be necessary to add water to a load of waste to aid in the formation and penetration of steam. Autoclaves use either a steam-activated exhaust valve that remains open during the replacement of air by live steam until the steam triggers the valve to close, or a pre-cycle vacuum to remove air prior to steam introduction.

(b) Sterilization will be verified using biological indicators (for example, *Bacillus stearothermophilus* spores) at locations throughout the autoclave, to include placement in the center of test loads, when the autoclave is first put into service, and after any maintenance or repairs. The primary means of verifying routine sterilization will be through using chemical indicators (for example, autoclave tape or labels) at locations throughout the autoclave. In addition each autoclave will be equipped with a permanent means to record time and the temperature of each operational event as a means of ensuring sterilization. The type of materials being handled must be reviewed and standard conditions for sterilization of each established. As a guide, the manufacturer's manual for the autoclaves will be consulted as a starting point in establishing these conditions. Treatment conditions to achieve sterility will vary in relation to the volume of material treated, the contamination level, the moisture content, and other factors that should be considered and which may cause the times to lengthen. In each case, the conditions will be established based on tests which verify that the conditions selected are effective. In addition to

being effective from viable agents, autoclaving effectively inactivates most protein toxins.

(c) *Dry heat.* Dry heat requires longer times or higher temperatures or both than does wet heat. If used, the specific sterilization times and temperatures must be determined for each type of material being sterilized. In general, sterilization by dry heat can be accomplished at 169–170 °C for periods of 2 to 4 hours. Higher temperatures reduce the time requirements. The heat transfer properties and spatial relation or arrangement of materials in the load are critical in ensuring effective sterilization.

(d) *Liquid disinfectants.* Liquid disinfectants may be used in surface treatment, in dip tanks, and, at sufficient concentration, as sterilants of liquid waste for final disposal. If liquid disinfectants are used, they must have been shown to be effective against the organisms present. Important considerations include: temperature, time of contact, the negative logarithm of hydrogen ion concentration (pH), concentration and state of dispersion, penetrability, and reactivity of organic material at the site of application. Small variations in these factors may make large differences in the effectiveness of disinfection, so complete reliance should not be placed on liquid disinfectants when the end result must be sterility. If evidence of efficacy under the proposed procedures has not been reported previously, preliminary studies to verify the efficacy of liquid disinfectants must be conducted. Such studies may include attempts to recover and quantitate the agent in question from liquid or swab samples, or sealed patches, by animal inoculation, plaque assay, agar or broth cultivation, and similar methods, following controlled decontamination under the same experimental conditions envisioned for the proposed studies.

(1) *Alcohol.* Ethyl or isopropyl alcohol at the concentration of 70–85 percent by weight will denature proteins but is slow in its germicidal action. Alcohols are effective disinfectants for lipid-containing viruses. These alcohols exhibit no activity against bacterial spores.

(2) *Phenolic compounds.* These are effective disinfectants against vegetative bacteria, including *Mycobacterium tuberculosis*, fungi, and lipid-containing viruses. The phenolics are not effective against bacterial spores or non-lipid-containing viruses. The concentrations used will be in accordance with the manufacturer's recommendations.



(3) *Formaldehyde solutions.*

Formaldehyde in solution at a concentration of 8 percent (formalin) is effective against vegetative bacteria, spores, and viruses. It loses considerable disinfectant activity below room temperature. Due to the toxic properties of formaldehyde, the use of formalin is restricted to surfaces or materials that are contained within appropriate engineering controls.

(4) *Quaternary ammonium compounds.*

These cationic detergents are strongly surface-active. They lose effectiveness in the presence of proteins and are neutralized by anionic detergents, such as soap. At low concentrations, they are bacteriostatic, tuberculostatic, sporostatic, fungistatic, and algistatic. At medium concentration, they are bactericidal, fungicidal, algicidal, and virucidal against lipophilic viruses. They are not tuberculocidal, sporicidal, or virucidal against hydrophilic viruses, even at high concentrations. The manufacturer's recommended dilution will be used.

(5) *Chlorine.* Sodium hypochlorite is normally used as a base for chlorine disinfectants. Free available chlorine is the active ingredient and, at concentrations of at least 2,500 parts per million (ppm) (0.25 percent), is a disinfectant that is active against most microorganisms and bacterial spores. Chlorine solutions at 2.5 percent free available chlorine are effective against most toxins. Chlorine solutions lose strength if exposed to air, so fresh solutions must be prepared whenever the free chlorine content falls below desired minimums.

(6) *Iodine.* The characteristics of chlorine and iodine are similar. Iodophor compounds with 1,600 ppm free available iodine provide a relatively rapid inactivation of all microorganisms, including some bacterial spores. A commonly available iodophor is Wescodyne. The manufacturer of Wescodyne recommends a range of dilution from 1 to 3 ounces per 5 gallons of water, giving a solution containing from 25 to 75 ppm of free iodine. At these concentrations, available iodine may be rapidly taken up by any extraneous protein present and will not be an effective sporocide. A solution providing 1,600 ppm iodine is recommended for hand washing or for use as a sporocide.

(7) *Mercurials.* Although the mercurials exhibit good activity against viruses, they are toxic and are not recommended for general use. They have poor activity against vegetative bacteria and are totally ineffective sporicides. The dilution

recommendations stated by the manufacturer will be followed.

(e) *Vapors and gases.* Formaldehyde, ethylene oxide, peracetic acid, beta-propiolactone, methyl bromide, and glutaraldehyde have all been used successfully as space sterilants where they can be employed in closed systems and with controlled conditions of temperature and humidity. Of these, methyl bromide, beta-propiolactone, and glutaraldehyde are not recommended because of their toxic properties. Peracetic acid can readily decompose with explosive violence in a concentrated state and must be used only in a diluted state and with extreme care. Formaldehyde and ethylene oxide are both regulated by OSHA for their potential human carcinogenicity, but do have permissible exposure levels (unlike beta-propiolactone, for example) and can be used safely under controlled conditions.

(1) *Formaldehyde.* Formaldehyde gas is, in general, the chemical of choice for space disinfection. Biological safety cabinets and associated effluent air-handling systems and air filters, incubators, laboratory rooms, buildings, or other enclosed spaces can be disinfected with formaldehyde. The procedures found in Appendix E of the National Sanitation Foundation Standard Number 49 will be followed for the disinfection of biological safety cabinets. Other enclosures or areas will be disinfected by following the same principles. To disinfect rooms, the generation of formaldehyde gas from heating powdered or flake paraformaldehyde is the preferred method. When area decontamination is performed, use 0.3 grams of paraformaldehyde for each cubic foot of space to be treated. The room or area must be above 70°F, the relative humidity above 70 percent, and the exposure time at least 2 hours (overnight is preferred). After the required time for disinfection, the room must be cleared of the formaldehyde gas (a small room with nonporous surfaces and no materials or equipment in the room can be cleared of all detectable formaldehyde by aeration for one hour, while larger areas with equipment in them may take a full day). Before formaldehyde is used as a space disinfectant, the area to be treated must be surveyed to ensure that there are no open containers of any acidic solution containing chloride ion in order to prevent the possible formation of bis (chloromethyl) ether, a human carcinogen. Specific OSHA requirements for posting of rooms and equipment, personnel protection, and

other requirements are found in 29 CFR 1910.1048.

(2) *Ethylene oxide (EtO).* EtO sterilization will only be conducted in a sterilizer designed for that purpose and designed to maintain potential exposure levels below the current OSHA standard. EtO is effective against all microorganisms, including spores, molds, pathogenic fungi, and highly resistant thermophilic bacteria. All materials to be used in contact with human skin (for example, clothing, shoes, masks, adhesive tape) must be aerated for at least 24 hours after sterilization and prior to use. Concentrations of 500 to 1000 ppm are required for sterilization. Specific OSHA requirements for the use of ethylene oxide are found in 29 CFR 1910.1047.

(f) *UV Radiation.* UV radiation at a wave length of 253.7 nanometers is a practical method for inactivating airborne viruses, mycoplasma, bacteria, and fungi. The usefulness of UV radiation on exposed surfaces is limited by its low penetrating power. UV radiation shall only be relied upon to sterilize surfaces when conventional methods, such as autoclaving or the use of liquid disinfectants, would make the product unusable. An example is data sheets that must be brought out of a biocontainment facility. The UV intensity must be at least 40 microwatts/cm<sup>2</sup> on the surface to be treated. Single sheets of paper may be treated by exposing them to this radiation for a minimum of 15 minutes. A calibrated photoelectric UV intensity meter, capable of measuring UV radiation at a wave length of 253.7 nanometers, will be used whenever a new UV source is installed, and quarterly thereafter, to ensure the UV source is providing at least 40 microwatts/cm<sup>2</sup> at the work surface. Bulbs should be cleaned routinely to remove any accumulated dust and prolong bulb performance and assure proper energy output. Protective eye wear and clothing may be necessary when working around UV radiation.

## § 627.34 Disposal.

Inactivation is the first step in the disposal of etiologic agents or materials that are potentially contaminated with them. All contaminated or potentially contaminated materials must be effectively disinfected or sterilized by an approved procedure discussed in § 627.33. After decontamination, reusable items, such as clothing or glassware, may be washed with other uncontaminated or decontaminated items.



(a) *Combustible items.* Combustible disposable items should be bagged and incinerated in an appropriate approved incinerator or otherwise disposed of in accordance with State and local regulations.

(b) *Noncombustible disposable items.* Items will be packaged as stated in § 626.34(e) and disposed of by a licensed waste hauler.

(c) *Equipment.* Equipment that cannot be autoclaved will be decontaminated by gaseous sterilization or with a suitable liquid disinfectant. Such equipment will be certified as decontaminated by the safety officer.

(d) *Waste.* Materials generated, such as solvents, acids, chemical carcinogens, radioactive isotopes, medical waste, or dead animals must be decontaminated, packaged, and then disposed of in accordance with EPA, NRC, local, State, and Federal regulations.

(e) *Mixed waste.* When two or more hazardous materials are mixed together, the mixture will be decontaminated and disposed of in accordance with EPA, NRC, State, and Federal regulations for the mixture, or for the most hazardous material.

(f) *Packaging.* Solid waste will be placed in cans, sturdy bags, or boxes. Rigid, puncture-resistant, sealable containers will be used for packaging "sharps." When wet materials are packaged for disposal, the materials will be placed in a leak-proof container. Heavy waste will be placed in rigid containers ensuring that the burst strength of the container is not exceeded.

(g) *Labeling.* A method of verifying that all items prepared for disposal have been decontaminated will be established for etiologic agent wastes. Mixed waste will be labeled as appropriate to indicate the hazards that must be addressed after decontamination.

(h) *Recordkeeping.* A manifest will be initiated and maintained, where required, to record the disposition and transfer of waste. Applicable Federal, State, and local ordinances will be followed.

#### Subpart F—Importation, Shipment, and Transport of Etiologic Agents

##### § 627.35 Introduction.

The CDC of the Public Health Service (PHS), the United States Department of Agriculture (USDA), the Food and Drug Administration (FDA), the Department of Transportation (DOT), the United States Postal Service and the International Air Transport Association (IATA) regulate the importation, shipment, and transportation of etiologic

agents. This chapter outlines the minimum administrative requirements the commander or institute director are to follow and gives sources for information on the requirements for importation, packaging, labeling, and shipment of etiologic agents.

##### § 627.36 Administration.

The commander or institute director will establish the following controls to ensure that etiologic agents are transported with proper authorization, controls, and procedures:

(a) Institute policies will be established in writing to ensure that before etiologic agents are acquired or shipped—

(1) The division chief responsible for the area where work with etiologic agents is to be conducted approves all acquisitions or shipments.

(2) The safety officer is informed in writing of the type and amount of any BL-4 or USDA-restricted etiologic agent (listed in HHS publication No. (NIH) 88-8395 or current edition) being received, and the estimated date of arrival.

(3) The recipient of all etiologic agents shipped from an institute will be documented.

(4) The commander or institute director approves all acquisitions and shipments of BL-4 or USDA-restricted etiologic agents.

(5) The commander or institute director approves all requests for shipments to or from foreign countries and to individuals not affiliated with an institution or agency (for example, physicians in private practice).

(6) The Office of The Surgeon General, United States Army, or the Commander, United States Army Materiel Command (AMC) approves the initial acquisition and use of all reference stocks of etiologic agents and transfers between Army RDTE activities in accordance with AR 70-65.

(7) There is full compliance with the regulatory requirements referenced in §§ 627.37, 627.38, 627.39 and 627.40.

(8) The following information regarding the recipient and the intended use of BL-4 and USDA-restricted animal pathogens, will be kept on file for 10 years. This information will also be kept for all shipments to or from foreign countries and to individuals not affiliated with an institution or agency (for example, physicians in private practice).

(i) The requester's name and address.

(ii) The type and amount of the etiologic agent to be sent.

(iii) The qualifications of the recipient of the etiologic agent.

(iv) The intended use of the etiologic agent.

(v) A statement indicating that the agent is not for human use.

(b) Etiologic agents assigned to biosafety level 1, 2, or 3, approved for shipment, and properly labeled and packaged may be shipped by commercial cargo carriers.

(c) All etiologic agents assigned to BL-4 or USDA-restricted animal pathogens approved for shipment and properly packaged, will be accompanied by a designated courier, or under close supervision of a responsible party who will monitor aspects of the shipment, ensuring that required transfers have been completed and documented and final receipt has been accomplished and acknowledged.

##### § 627.37 Importation directives.

Importation of etiologic agents is subject to the Public Health Service Foreign Quarantine Regulations (42 CFR 71.156). Examples of permits authorizing the importation or receipt of regulated materials and specifying conditions under which the etiologic agent is shipped, handled, and used are contained in appendix E to this part.

##### § 627.38 Shipment directives.

Shipping unmarked and unidentified etiologic agents is prohibited. Etiologic agents will be packaged, labeled, and shipped according to the requirements found in the Interstate Shipment of Etiologic Agents Regulations (42 CFR Part 72) and its amendments. The USDA regulations in 9 CFR Parts 102 through 104, 122 and the FDA regulations in 21 CFR Parts 312 and 600 through 680 will also be followed as applicable. Packaging and labeling requirements for interstate shipment of etiologic agents are summarized and illustrated in appendix D. Permits authorizing the shipment of regulated materials and specifying conditions under which the etiologic agent is shipped, handled, and used are contained in appendix E to this part.

##### § 627.39 Transportation directives.

The packaging and labeling requirements cited above must be followed for the local transport of etiologic agents and diagnostic specimens by courier or by other delivery services. Similar requirements and restrictions applicable to the transport of etiologic agents, diagnostic specimens, and biological products by all modes of transportation (that is, air, motor, rail, and water) are imposed by the Department of Transportation (49 CFR Part 173), IATA "Dangerous Goods Regulations," the Air Transport Association "Restricted Articles Tariff



6-D," the International Civil Aviation Organization (ICAO), Postal Bulletin No. 21246 "International Mail-Hazardous Materials," 39 CFR, and, the Domestic Mail Manual. When shipments exceed 4 liters, the requirements found in AR 740-32 will be followed.

#### § 627.40 Additional requirements.

Additional requirements for importation, shipment, and transportation of infectious agents and hazardous materials that must be followed are contained in the following directives:

(a) AR 40-12, Medical and Agricultural Foreign and Domestic Quarantine Regulations for Vessels, Aircraft, and Other Transports of the Armed Forces.

(b) AR 70-65, Management of Controlled Substances, Ethyl Alcohol, and Hazardous Biological Substances in Army Research, Development, Test, and Evaluation Facilities.

#### § 627.41 Sources for further information on shipment of etiologic agents.

(a) Guide for Transportation of Hazardous Materials, Vol. 4(1), February 10, 1975. Copies are obtainable from the Office of Research Grants Inquiries, NIH, Department of Health and Human Services, 5333 Westbard Avenue, Bethesda, MD 20205.

(b) The CDC, Office of Biosafety, 1600 Clifton Road N.E., Atlanta, Georgia 30333. Telephone (404) 639-3883, or FTS: 236-3883.

(c) The American Type Culture Collection (ATCC), Packaging and Shipping of Biological Materials at ATCC. Copies may be obtained from the ATCC, 12301 Parklawn Drive, Rockville, MD 20852. Phone (301) 881-2600.

(d) National Committee for Clinical Laboratory Standards (NCCLS), Procedures for the Domestic Handling and Transport of Diagnostic Specimens and Etiologic Agents, (H5-A2), Second edition. Vol. 5, No. 1. Copies are obtainable from the NCCLS, 771 East Lancaster Avenue, Villanova, PA 19085.

### Subpart G—Facilities

#### § 627.42 Introduction.

The design of the facility is important in providing a secondary barrier to protect individuals inside and outside the facility. Because the hazards presented by various organisms and materials vary, the requirements for the facility will vary accordingly. The minimum facility requirements for the various biosafety levels and toxins are described below. The biosafety levels correspond to those described in the HHS Publication Biosafety in Microbiological and Biomedical

Laboratories (HHS No. (NIH) 88-8395), while the large-scale biosafety levels were adapted from those described in the NIH Guidelines for Research Involving Recombinant DNA Molecules.

#### § 627.43 Biosafety level 1.

(a) *Laboratories.* Each laboratory used for this level will, as a minimum, have the following features:

- (1) A sink for handwashing.
  - (2) Work surfaces that are impervious to water and resistant to acids, alkalis, organic solvents, and moderate heat.
  - (3) Fly screens on any windows that can be opened.
  - (4) Furnishings and surfaces that are sturdy and designed to be easily cleaned.
  - (5) Spaces between furnishings and equipment that are accessible for cleaning.
- (b) *Animal facilities.* Each room will have the following features:
- (1) Design and construction to facilitate cleaning and housekeeping.
  - (2) A sink for handwashing within the facility.
  - (3) Fly screens on any windows that can be opened.
  - (4) Ventilation designed so that the direction of airflow in the animal facility is inward, with the exhausted air discharged to the outside without being recirculated.
  - (5) Self-closing doors that open inward.

#### § 627.44 Biosafety level 2.

(a) *Laboratories.* Each laboratory used for this level of hazard will have, in addition to the requirements stated in § 627.43(a), the following:

- (1) An autoclave available.
  - (2) Containment equipment necessary for the operations unless the safety officer approves the use of a compensatory level of personal protective equipment.
  - (3) An eyewash available near the laboratory.
- (b) *Animal facilities.* In addition to the requirements stated in § 627.43(b), facilities will include—

- (1) A sink for handwashing in each room where animals are housed.
- (2) An autoclave available in the building.
- (3) Appropriate containment equipment unless the safety officer approves the use of a compensatory level of personal protective equipment.

#### § 627.45 Biosafety level 3.

(a) *General requirements.* Each suite used as a laboratory or in which infected animals are housed will, as a minimum, have the following features:

(1) Physical separation from areas which are open to unrestricted traffic.

(2) All entrances to each laboratory or animal room from the nonlaboratory access corridors will be through two sets of doors. A change room or airlock may be incorporated between the doors.

(3) The interior surfaces of walls, floors, and ceilings will be water resistant so that they may be easily cleaned.

(4) All penetrations into the walls, floors, and ceilings should be sealed or capable of being sealed to facilitate decontamination.

(5) A foot, elbow, or automatically operated sink will be located near the exit door to each laboratory or animal room.

(6) An autoclave should be in each laboratory or animal room and will be available to the facility.

(7) A ventilation system that will—

- (i) Create directional airflow that draws air into the laboratory through the entry areas.
- (ii) Not recirculate laboratory air.
- (iii) Discharge the exhaust air from the laboratory to the outside and disperse the exhaust air away from occupied areas and air intakes.
- (iv) Exhaust the HEPA-filtered air from Class I or II biological safety cabinets or other primary containment devices directly to the exterior of the laboratory or through the building exhaust system. Exhaust air from the cabinets may be recirculated within the laboratory if the cabinet is tested and certified at least every 12 months. If the filtered cabinet exhaust is discharged through the building exhaust system, it will be connected to this system in a manner (for example, thimble unit connection) that avoids any interference with the air balance of the cabinets or the building exhaust system.

(8) All windows to the facility will be sealed shut.

(9) Appropriate biological safety cabinets or other specialized containment equipment will be provided.

(10) Any vacuum line in the facility will have a HEPA filter and liquid disinfectant trap.

(11) Bench tops that are impervious to water and resistant to acids, alkalis, organic solvents, and moderate heat.

(12) Furnishings that are sturdy and spaces between benches, cabinets, and equipment that are accessible for cleaning.

(13) An eyewash available in or near the laboratory.

(b) *Additional animal facility requirements.* In addition to the requirements given in § 627.44(b) and



627.45(a), all doors to the animal rooms will open inward and be self-closing.

#### § 627.46 Biosafety level 4.

The engineering controls within the facility must provide absolute biological containment. All procedures with etiologic agents requiring this biosafety level of facilities, equipment, and procedures must be conducted either in Class III biological safety cabinets, or in a facility that is designed for the use of a personal positive pressure suit as described in § 627.46(b) in conjunction with Class I or II biological safety cabinets.

(a) *General requirements.* The facility will have the following features:

(1) A separate building or a clearly demarcated and isolated area within a building which incorporates positive personnel control for access.

(2) All entrances from access corridors incorporate an inner and outer change room.

(3) Inner and outer change rooms separated by a shower facility.

(4) A double-doored autoclave, fumigation chamber, or ventilated airlock for passage of all items which do not enter the facility through the change room.

(5) Interior surfaces of walls, floors, and ceilings resistant to water and chemicals to facilitate cleaning and disinfecting.

(6) Walls, floors, and ceilings of the facility constructed to form a sealed internal shell which facilitates fumigation and is animal and insect proof.

(7) All penetrations into the walls, floors, and ceilings sealed.

(8) All liquid drains in the facility connected directly to a liquid waste decontamination system.

(i) Holding tanks collecting waste from sinks, biological safety cabinets, floors, and autoclave chambers provide decontamination by heat treatment.

(ii) Holding tanks collecting waste from shower rooms and toilets provide decontamination by heat or chemical disinfectant methods.

(9) Sewer and other ventilation vents contain in-line HEPA filters.

(10) Internal facility appurtenances (for example, light fixtures, air ducts, and utility pipes) arranged to minimize the horizontal surface area on which dust can settle.

(11) A foot, elbow, or automatically operated handwashing sink located near the exit door to each laboratory or animal room.

(12) Self-closing and lockable access doors.

(13) A ventilation system that—

(i) Is dedicated to the facility and provides fresh air meeting American Society of Heating, Refrigerating, and Air Condition Engineers, Inc. (ASHRAE) Standard 62.

(ii) Maintains a negative pressure differential and assures flow inward from areas outside of the facility toward areas of highest potential risk.

(iii) Has manometers or magnehelic gauges to provide, sense, and display pressure differentials between adjacent areas maintained at different pressure levels. An alarm will sound when the pressures fall below acceptable levels.

(iv) Has the air supply and exhaust interlocked to ensure that exhaust failure or reduction will not allow the air pressure in the area to become positive to the adjacent areas.

(v) Does not recirculate exhaust air.

(vi) Is HEPA-filtered and discharged to the outside, dispersing the exhaust air away from occupied areas and air intakes.

(vii) Has the HEPA filters on the exhaust located as near to the rooms as is practicable.

(viii) Has the filter chambers designed to allow in-place decontamination before the filters are removed and to facilitate certification testing.

(ix) Contains prefilters and HEPA filters in the air supply system to protect the supply air system should air pressures become unbalanced.

(x) Exhausts the HEPA-filtered air from Class I or II biological safety cabinets directly into the laboratory or to the exterior of the building. If the HEPA-filtered exhaust from these cabinets is recirculated, the cabinets are tested and certified every 6 months. If the filtered cabinet exhaust is discharged through the building exhaust system, it will be connected to this system in a manner (for example, thimble unit connection) that avoids any interference with the air balance of the cabinets or the building exhaust system.

(xi) Passes the treated exhaust air from Class III biological safety cabinets through two sets of HEPA filters in series to the exterior of the facility through the laboratory exhaust air system.

(14) Windows (if present) sealed shut and breakage resistant.

(15) Has a double-doored autoclave for decontaminating materials passing out of the facility. The autoclave door that opens to the area external to the facility is sealed to the outer wall and automatically controlled so that it can only be opened after the autoclave sterilization cycle has been completed.

(16) Has a pass-through dunk tank, fumigation chamber, or an equivalent decontamination method for materials

and equipment that cannot be autoclaved.

(17) Has central vacuum systems (if present) that—

(i) Do not serve areas outside the facility.

(ii) Have an in-line HEPA filter placed as near as practicable to each use point or service cock.

(iii) Have filters designed to allow in-place decontamination and replacement.

(18) Liquid and gas services to the facility provided with protective devices that prevent backflow.

(b) *Additional requirements for personal positive pressure suit areas.* If personal positive pressure suits are worn in lieu of using Class III biological safety cabinets for containment, a special suit area will be provided. The suit area will provide the following, in addition to the requirements stated in § 627.46(a):

(1) An exhaust system dedicated to that area that provides filtration by two sets of HEPA filters installed in series. This system will be backed up by a duplicate filtration unit, exhaust fan, and an automatically starting emergency power source. The ventilation system will maintain the suit area under negative pressure relative to the surrounding areas.

(2) An entry area consisting of an airlock fitted with airtight doors.

(3) A chemical shower to decontaminate the surface of the personal positive pressure suit upon exit.

(4) An air supply and distribution system to support the life support system of the personal positive pressure suits.

(5) Emergency lighting and communications systems.

(6) Sealed penetrations into the internal shell of the area.

(7) A double-doored autoclave to decontaminate waste materials to be removed from the suit area.

(c) *Additional laboratory requirements.* In addition to those given in § 627.45, if water fountains are provided, they will be foot operated and located in the facility corridors outside the laboratory.

(d) *Additional animal facility requirements.* In addition to those requirements given in § 627.45, all animal facility external doors will be self-locking.

#### § 627.47 Large-scale facilities.

The following requirements apply to facilities in which an individual culture of viable etiologic agents exceed 10 liters:



(a) *BL-1 LS.* In addition to the laboratory requirements stated § 627.43(a), the exhaust gases removed from a closed system or other primary containment equipment shall be treated by filters which have efficiencies equivalent to HEPA filters or by other equivalent procedures (for example, incineration) to minimize the release of viable organisms.

(b) *BL-2 LS.* In addition to the requirements stated in §§ 627.44(a) and 627.47(a), these facilities will have—

(1) Rotating seals and other mechanical devices directly associated with a closed system used to contain viable organisms shall be designed to prevent leakage or shall be fully enclosed in ventilated housings that are exhausted through filters which have efficiencies equivalent to HEPA filters or through equivalent treatment devices.

(2) A closed system used to propagate and grow viable organisms shall include monitoring or sensing devices that monitor the integrity of containment during operations.

(3) Closed systems used for the propagation and growth of viable organisms shall be tested operationally for integrity of the containment features. The containment will be rechecked following modification or replacement of essential containment features. Procedures and methods used in the testing shall be appropriate for the equipment design and for recovery and demonstration of the test organism. Records of tests and results shall be maintained on file.

(c) *BL-3 LS.* The requirements stated in §§ 627.45. and 627.57(b) apply, and all closed systems and other primary containment equipment used in handling cultures of viable organisms shall be located within a controlled area which meets the requirements of a BL-3 facility plus the following requirements:

(1) All utilities and service or process piping or wiring entering the controlled area shall be protected against contamination.

(2) A shower facility shall be provided. This facility shall be located near the controlled area.

(3) The controlled area shall be designed to preclude release of culture fluids outside in the event of an accidental spill or release from the closed systems or other primary containment equipment.

(4) The controlled area shall have a ventilation system capable of controlling air movement. The movement of air shall be from areas of lower contamination potential to areas of higher contamination potential. If the ventilation system provides positive pressure supply air, the system shall

operate so as to prevent the reversal of air movement or shall be equipped with an alarm that would be actuated if reversal in the direction of air movement were to occur. The exhaust air from the controlled area shall not be recirculated to other areas of the facility. The exhaust air from the controlled area may be discharged to the outdoors after filtration or other means of effectively reducing an accidental aerosol burden, and dispersed clear of occupied buildings and air intakes.

#### § 627.48 Toxins.

General requirements for all facilities in which toxins are used are as follows. Such facilities will—

(a) Have a ventilation system that provides three to six air changes per hour, and that provides a directional airflow inward relative to the access halls.

(b) Have a sink for handwashing.

(c) Have an eyewash available.

(d) Have bench tops that are impervious to water and resistant to acids, alkalis, organic solvents, and moderate heat.

(e) Have furniture, furnishings, and surfaces that are sturdy and designed to be easily cleaned.

(f) Be arranged so that items are accessible for cleaning.

(g) Have a quick-drench shower available within the facility.

(h) A fume hood, biological safety cabinet, glove box, or equivalent engineering control equipped with HEPA filters and with charcoal filters if volatile materials are being used.

#### Subpart H—Engineering Controls

##### § 627.49 Introduction.

As required by the OSHA and recommended by the American Industrial Hygiene Association (AIHA) and the CDC, engineering controls and proper microbiological techniques are the primary means of protecting personnel who work with potentially hazardous biological materials. In situations of potentially higher hazard, these engineering controls are supplemented by personal protective clothing and equipment. Thus, the engineering controls discussed in this chapter will be the primary means of personnel and environmental protection when working with etiologic agents. Because of the importance of these engineering controls, this chapter contains not only requirements for the engineering and construction of these controls, but also requirements for their certification and continuous satisfactory performance. These will be described for each engineering control.

##### § 627.50 Class I biological safety cabinet.

(a) *Description.* The Class I biological safety cabinet (figure H-I in appendix F to this part) is a ventilated cabinet for personnel protection only. The cabinet provides an uncirculated inward flow of air away from the operator. The exhaust is passed through a HEPA filter. It may be discharged into the laboratory or vented out of the laboratory and dispersed away from occupied spaces or air intakes. When the exhaust is recirculated in a BL-2 or BL-3 facility, the cabinet must be tested and certified annually. In a BL-4 facility, if the exhaust is recirculated, the cabinet must be tested and certified semiannually.

(b) *Uses.* These cabinets are used if personnel protection against the microorganisms is required; for modest quantities of volatile, toxic, or radioactive chemicals (in concentrations and quantities associated with biological systems) if vented to the outside; and when sterility is not required. They are commonly used for housing tabletop centrifuges, in the necropsy of small animals, and for changing animal bedding.

(c) *Prohibitions.* This class of cabinet is not to be used when sterility must be maintained. In addition, volatile, toxic, or radioactive materials can not be used in this class of cabinet when the exhaust air is not exhausted to the exterior.

(d) *Certifications and requirements.* (1) The inward air velocity on these cabinets will be an average of 100 plus or minus 20 linear feet per minute (lfpm). Each cabinet must be certified before use and semiannually thereafter by a face velocity test. Additionally, smoke tests will be performed annually to verify containment.

(2) The exhaust system will have a HEPA filter, which will be tested initially upon installation, after repair or replacement, and every 2 years thereafter (except when required more often). Filters will be certified to be 99.97 percent effective in capturing particulate matter by a leakage test using mineral oil or other appropriate aerosol dispersed as 0.3 micron droplets.

##### § 627.51 Class II biological safety cabinet.

All Class II biological safety cabinets (figure H-II in appendix F to this part) are ventilated cabinets for personnel and product protection, having an open front with inward air flow for personnel protection.

(a) *Operating standards.* (1) All of these cabinets must conform and be certified to meet National Sanitation Foundation (NSF) Standard No. 49 revised, June 1987, for the applicable type of cabinet.



(2) After installation and before use, and annually thereafter, the cabinets will be tested in accordance with NSF Standard No. 49 (latest revision June 1987) as follows:

- (i) Primary (required) tests—
  - (A) Velocity profile test.
  - (B) Work access opening airflow (face velocity) test.
  - (C) HEPA filter leak test.
  - (D) Cabinet integrity test (soap bubble test) for cabinets with positive pressure internal plenums.
- (ii) Secondary (optional) tests—
  - (A) Vibration test.
  - (B) Electrical leakage and ground circuit resistance tests.
  - (C) Noise level test.
  - (D) Lighting intensity test.
  - (E) UV light intensity test.

(3) After repairs or alterations to the cabinetry or ventilation system that affect the cabinet, the tests listed in § 627.51(a)(2) will be performed for the relevant parameters.

(4) The work access opening airflow (face velocity) test, as specified in NSF Standard No. 49 (latest revision, June 1987), will be performed to check that the cabinet is within specifications on an annual basis for BL-1 and BL-2 and toxin use. This test will be performed semiannually on cabinets used for BL-3 and BL-4 as well as for work with dry forms of toxins.

(5) When the exhaust is recirculated in a BL-4 facility, the cabinet must be tested and certified semiannually.

(b) *Class IIA biological safety cabinets.*—(1) *Description.* A Class IIA biological safety cabinet is one in which typically 70 percent of the air is recirculated within the cabinet and the exhaust passes through a HEPA filter before discharge. The exhaust may be exhausted into the room and positive-pressure contaminated ducts and plenums within the cabinet are allowed. Type A cabinets shall have a minimum calculated face velocity of 75 feet per minute (fpm).

(2) *Uses.* These cabinets are for working with low-to-moderate risk biological samples and for protecting personnel against biological material while providing a sterile atmosphere in which to handle the material.

(3) *Prohibitions.* Materials that are toxic or volatile must not be used in these cabinets.

(c) *Class IIB<sub>1</sub> biological safety cabinets.*—(1) *Description.* A Class IIB<sub>1</sub> biological safety cabinet is one that maintains a minimum average inflow of air of 100 plus or minus 20 lfpm and in which typically 30 percent of the air is recirculated. All recirculated and exhausted air passes through two HEPA filters in series. All contaminated

internal ducts and plenums are under negative pressure. Type B cabinets shall have a minimum calculated face velocity of 100 fpm.

(2) *Uses.* When ultra-sterility is needed, these are the cabinets of choice. The double filtration achieves a cleaner atmosphere. Minute quantities of volatile, toxic, or volatile radioactive materials coincidental to use in biological systems may also be used in these cabinets.

(3) *Prohibitions.* More than minute quantities of toxic, volatile, or radioactive materials must not be used in these cabinets.

(4) *Additional certifications or requirements.* None.

(d) *Class IIB<sub>2</sub> biological safety cabinets.*—(1) *Description.* A Class IIB<sub>2</sub> biological safety cabinet is one that maintains a minimum average of 100 plus or minus 20 lfpm inward flow and in which all air is exhausted directly from the cabinet through a HEPA filter without recirculation within the cabinet. All contaminated ducts and plenums are under negative pressure. Type B cabinets shall have a minimum calculated face velocity of 100 fpm.

(2) *Uses.* These cabinets are recommended when small quantities of volatile, flammable, or toxic chemicals must be used coincidentally with items requiring sterility.

(3) *Prohibitions.* While these cabinets do offer the greatest degree of safety for volatile, toxic, and flammable chemical handling in a sterile environment, they are not to be used in place of a fume hood to prepare stock solutions of hazardous chemicals.

(e) *Class IIB<sub>3</sub> biological safety cabinets.*—(1) *Description.* A Class IIB<sub>3</sub> biological safety cabinet is one that meets all of the requirements of a Class IIB<sub>2</sub> biological safety cabinet except that it recirculates most (typically 70 percent) of the air inside the cabinet. Type B cabinets shall have a minimum calculated face velocity of 100 fpm.

(2) *Uses.* Minute amounts of nonflammable chemicals can be used coincidentally with low-to-moderate risk biological agents.

(3) *Prohibitions.* Flammable materials and more than minute amounts of toxic, radioactive, or volatile chemicals must not be used in these cabinets.

(4) *Additional certifications or requirements.* None.

#### § 627.52 Class III biological safety cabinet.

(a) *Description.* These cabinets (figure H-III in appendix F to this part) are totally enclosed, ventilated cabinets of gas-tight construction. Operations are conducted through attached rubber gloves. The supply of air is drawn into

the cabinet through HEPA filters. The exhaust air is treated by double HEPA filtration, or by HEPA filtration followed by incineration, and is not allowed to recirculate within the room.

(b) *Uses.* These cabinets provide the ultimate protection for personnel. They are suitable for low, moderate, and high-risk etiologic agents.

(c) *Prohibitions.* More than minute amounts of flammables must not be used in these cabinets.

(d) *Certifications and requirements.*

(1) These cabinets will have a manometer or magnehelic gauge that indicates the negative pressure that is maintained inside the cabinet. The pressure inside the cabinet should be a minimum of 0.5 inches water gauge negative to the surrounding room.

(2) These cabinets will be pressure tested by the soap bubble or halogen leak test as prescribed in NSF Standard No. 49, Appendix B1 (latest revision, June 1987), and certified, when the HEPA filter units are serviced.

#### § 627.53 Fume hood.

Fume hoods in which etiologic agents are handled must use proven technologies to provide optimal containment. Fume hood placement, design, and capture testing requirements for use in designing new laboratories can be found in the latest edition of Industrial Ventilation, A Manual of Recommended Practices, published by the American Conference of Governmental Industrial Hygienists.

(a) *Description.* Fume hoods are common chemical laboratory furnishings designed to capture fumes from chemicals that are used within them. Air is drawn through the opening and vented to the exterior without recirculation.

(b) *Uses.* Fume hoods provide excellent containment for handling hazardous chemicals.

(c) *Prohibitions.* Moderate risk biologicals and open containers of dry forms of toxins must not be used in a fume hood without HEPA filtration. Fume hoods should never be used when sterility is required.

(d) *Certification and requirements.* (1) Inward air flow will be an average of 100 plus or minus 20 lfpm as measured at the face of the fume hood. Proper function of laboratory hoods is not only a function of face velocity. An evaluation of the total operating environment is necessary.

(2) When filters are required, they will be certified by the mineral oil droplet (HEPA) or Freon (Charcoal) leak test as appropriate. Leakage through the filters will be less than 0.05 percent for Freon



and 0.03 percent for oil droplets when initially installed.

(3) Fume hoods will be provided with indicator devices to give a warning should the ventilation system fail or if the hood face velocity falls below an average of 80 lfpm.

(4) Hood air flow will be certified when installed, when maintenance is performed on the ventilation system, and semiannually thereafter.

#### § 627.54 Glove box.

(a) *Description.* A glove box is an enclosure that provides a positive barrier from liquids, solids, and chemical vapors. A glove box has viewing ports and glove ports for access. The box maintains personnel protection through solid barriers and maintenance of a negative pressure relative to its surroundings.

(b) *Uses.* Glove boxes are used when extreme containment is needed for highly toxic chemicals, especially for dry chemicals that can be swept out of containers by the airflow in hoods.

(c) *Prohibitions.* Unventilated boxes must not be used with volatile flammable materials and should be used with volatile toxic materials unless dilution ventilation is provided.

(d) *Additional certifications and requirements.* (1) The glove box will be maintained at a pressure of at least 0.25 inches water gauge less than its surroundings.

(2) The pressure differential will be indicated by a manometer or magnehelic gauge. Indicator devices will display a loss of pressure below 0.25 inches water gauge.

(3) Gloves will be changed at appropriate intervals (dependent on the box contents) to ensure they provide the protection needed.

(4) Inlets that provide dilution air will be protected by HEPA filters.

#### § 627.55 Ventilated balance enclosures.

(a) *Description.* A ventilated balance enclosure is a box that surrounds a balance and has a small open area for access and handling material in the front. Air is exhausted out the rear of the enclosure.

(b) *Uses.* A ventilated balance enclosure is used when containment of a balance is required to weigh hazardous materials that have a low vapor pressure (such as toxins). These enclosures are also used when it is best to use the balance in other than a fume hood (due to the turbulence and vibration) and when biological safety cabinets or glove boxes are inappropriate or unavailable. Dry forms of toxins may be weighed in these enclosures.

(c) *Prohibitions.* Very volatile or highly toxic volatile materials must not be handled in ventilated balance enclosures unless they are placed in closed containers in a properly functioning fume hood before being transferred to the balance enclosure.

(d) *Additional certifications and requirements.* (1) The flow through the openings in the enclosure will be at least 60 lfpm and must average between 60 and 80 lfpm.

(2) Containment will be certified prior to first use and annually thereafter by smoke tubes.

(3) The air flow will be certified initially and semiannually by averaging readings taken from the face of the opening.

#### § 627.56 Ventilated cage enclosures.

There are a number of cage-ventilated enclosures in which infected animals may be housed at levels corresponding to the various classes of biological safety cabinets. A brief description of four different types of animal ventilated cages is given below. This is not a complete description of all the different animal ventilated cages available. The proper functioning of these will be tested initially, upon each connection to exhaust sources, and at least annually. The inward flow rates on the partial containment systems and pressure checks on the total containment cages will be performed. Prior to selecting such equipment, an evaluation of the function and the equipment should be made, and the methods for testing and decontamination should be analyzed and documented.

(a) *Filter-top cages.* Small laboratory animal polystyrene or polycarbonate cage bottoms are fitted with a dome shaped glass fiber or polyester filter cage cover. The dome shaped filters help reduce the dissemination of aerosols, and the spread of infectious agents. Adequate ventilation around cages fitted with a dome shaped filter is essential since they may contain elevated ammonia and carbon dioxide levels, and high temperature and humidity. Ventilation recommendations in the NIH publication 86-23, 1985 "Guide for the Care and Use of Laboratory Animals" will be followed.

(b) *Forced ventilation cages.* This is a small HEPA-filtered cage connected to a centralized exhaust system. A minimum airflow of 0.03 m<sup>3</sup> /min per cage is required. Ventilation rates may vary with the size of the cage, and the number and type of animals being housed.

(c) *Cubicle-type isolation cage.* This is a partial containment unit which holds several animal cages. This unit is a

negative pressure HEPA-filtered stainless steel cage. A minimum airflow of 0.3 m<sup>3</sup> /min per cage is required for a 0.24 m<sup>3</sup> unit. Ventilation rates may vary with the size of the cage and the number and type of animals being housed.

(d) *Total containment cage.* This unit is a negative pressure or positive pressure HEPA-filtered stainless steel cage which has the filters incorporated into the design. It is halogen gas-leak tight and can be considered a Class III biological safety cabinet. A minimum airflow of 0.3 m<sup>3</sup> /min per cage is required for a 0.24 m<sup>3</sup> unit. Ventilation rates may vary with the size of the cage, and the number and type of animals being housed.

#### § 627.57 Ventilated cage areas.

Ventilated cage areas within a room that are solid-walled and bottomed areas for containing multiple cages housing infected animals. The containment for these areas is equivalent to the Class I biological safety cabinet. For testing purposes, they will be treated the same as a Class I biological safety cabinet.

### Appendix A to Part 627—References

Publications referenced in this part can be obtained from the National Technical Information Services, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

#### Required Publications

##### AR 11-34

Army Respiratory Protection Program. (Cited in § 627.31(h)(2) and 627.31(h)(4).)

##### AR 40-5

Preventive Medicine. (Cited in § 627.8.)

##### AR 40-10

Health Hazard Assessment Program in Support of the Army Materiel Acquisition Decision Process. (Cited in § 627.7(a)(8).)

##### AR 40-12

Medical and Agricultural Foreign and Domestic Quarantine Regulations for Vessels, Aircraft, and Other Transports of the Armed Forces. (Cited in § 627.40(a).)

##### AR 40-66

Medical Records and Quality Assurance Administration. (Cited in § 627.9.)

##### AR 40-400

Patient Administration. (Cited in § 627.8(e).)

##### AR 70-85

Management of Controlled Substances, Ethyl Alcohol, and Hazardous Biological Substances in Army Research, Development, Test, and Evaluation Facilities. (Cited in §§ 627.36(a)(6) and 627.40(b).)



## AR 385-10

Army Safety Program. (Cited in §§ 627.6 and 627.31(h)(4).)

## AR 385-69

Biological Defense Safety Program. (Cited in §§ 627.6, 627.7(a), 627.7(a)(8), 627.7(d), 627.11(c), 627.18(a) and 627.18(f)(1).)

## AR 740-32

Responsibilities for Technical Escort of Dangerous Materials. (Cited in § 627.39.)

## Related Publications

A related publication is merely a source of additional information. The user does not have to read it to understand this pamphlet.

## AR 40-14

Control and Recording Procedures for Exposure to Ionizing Radiation and Radioactive Materials.

## ANSI Z86.1-1973

Breathing Air

## ASHRAE Standard 62

Bacterial Toxins: A Table of Lethal Amounts, Gill, D.M., Microbiological Reviews, Volume 46, Number 1: March 1982, pages 86-94.

## Biohazards Reference Manual

American Industrial Hygiene Association, 1985, Clinical Medicine Branch, Division of Host Factors, Center for Infectious Disease, Centers for Disease Control, Atlanta, GA 30333, telephone: (404) 639-3356, Compressed Gas Association Pamphlet G-7.1

## Grade D Breathing Air

Dangerous Goods Regulations, International Air Transport Association (IATA), Publications Section, 2000 Peel Street, Montreal, Quebec, Canada H3A 2R4, Tel (514) 844-6311. DHEW Pub. No. (NIH) 76-1165

Biological Safety Manual for Research Involving Oncogenic Viruses, Executive Order 12196

Safety and Health Programs for Federal Employees, 26 February 1980

Guide for Adult Immunizations, Published by the American College of Physicians, Guide for Transportation of Hazardous Materials, Vol. 4(1) February 10, 1975. (Copies may be obtained from the Office of Research Grants Inquiries, NIH, Department of Health and Human Services, 5333 Westbard Avenue, Bethesda, MD 20205.)

Guidelines for Laboratory Design, Health and Safety Considerations, L. DiBerardinis, et al., John Wiley and Sons, 1987

Guidelines for Prevention of Herpesvirus Simiae (B Virus) Infection in Monkey Handlers, Kaplan, J.E., et al., Mortality and Morbidity Weekly Report, Volume 36, Number 41; October 23, 1987, pages 680-689.

HHS Publication No. (NIH) 88-8395, Biosafety in Microbiological and Biomedical Laboratories

Industrial Ventilation, A Manual of Recommended Practice Published by the American Conference of Governmental Industrial Hygienists.

Laboratory Safety for Arboviruses and Certain Other Viruses of Vertebrates, The American Journal of Tropical Medicine and Hygiene, 29:1359-1381, 1980.

NIH Guidelines for Research Involving Recombinant DNA Molecules (51 FR 16958, May 7, 1986).

NIH publication 86-23, Guide for the Care and Use of Laboratory Animals

NSF Standard #49, National Sanitation Foundation Standard Number 49, Class II (Laminar Flow) Biohazard Cabinetry

Packaging and Shipping of Biological Materials at ATCC, The American Type Culture Collection (ATCC). (Copies may be obtained from the ATCC, 12301 Parklawn Drive, Rockville, MD 20852. Telephone (301) 881-2600.)

Postal Bulletin No. 21246, International Mail-Hazardous Materials

Procedures for the Domestic Handling and Transport of Diagnostic Specimens and Etiologic Agents, National Committee for

Clinical Laboratory Standards (NCCLS), (H5-A2), Second edition. Vol. 5, No. 1. (Copies may be obtained from the NCCLS, 771 East Lancaster Avenue, Villanova, PA 19085.)

Restricted Articles Tariff 6-D, Air Transport Association

Technical Instructions for the Safe Transport of Dangerous Goods by Air, International Civil Aviation Organization (ICAO) Intereg Group, 5724 Pulaski Road, Chicago, IL 60646, Tel. (312) 478-0900.

The Centers for Disease Control, Office of Biosafety, 1600 Clifton Road NE., Atlanta, Georgia 30333. Telephone (404) 639-3883, or FTS: 236-3883.

## 9 CFR Parts 102 Through 104, 122

Animals and Animal products.

## 10 CFR Chapter 1

Nuclear Regulatory Commission.

## 21 CFR Parts 312, 600 Through 680

Food and drugs.

## 29 CFR Part 1910

Occupational Health and Safety Administration Safety and Health Standards.

## 39 CFR Part 111

Postal Service.

## 40 CFR Parts 1500 Through 1508

Protection of environment.

## 42 CFR Parts 71 and 72

Public Health Service Foreign Quarantine Regulations.

## 49 CFR Parts 172 and 173

The Department of Transportation.

### Appendix B to Part 627—Resource List for Immunoprophylaxis of Personnel at Risk

#### B-1. RECOMMENDATIONS FOR IMMUNOPROPHYLAXIS OF PERSONNEL AT RISK

Description of disease	Product	Recommended for use in	Source of product
Anthrax	Inactivated vaccine	Personnel working regularly with cultures, diagnostic materials, or infected animals.	USAMRIID. <sup>1</sup>
Botulism	Pentavalent toxoid (A,B,C,D,E) (IND). <sup>2</sup>	Personnel working regularly with cultures or toxin	CDC. <sup>3</sup>
Cholera	Inactivated vaccine	Personnel working regularly with large volumes or high concentrations of infectious materials.	Commercially available.
Diphtheria Tetanus (Adult)	Combined toxoid	All laboratory and animal care personnel irrespective of agents handled.	Commercially available.
Eastern equine encephalitis (EEE)	Inactivated vaccine (IND) <sup>2</sup>	Personnel who work directly and regularly with EEE in the laboratory.	USAMRIID. <sup>1</sup>
Hepatitis A	Immune Serum Globulin [ISG (Human)]	Animal care personnel working directly with chimpanzees naturally or experimentally infected with Hepatitis A virus.	Commercially available.
Hepatitis B	Serum-derived or recombinant vaccine.	Personnel working regularly with human blood and blood components.	Commercially available.
Influenza	Inactivated vaccine	(Vaccines prepared from earlier isolated strains may be of little value in personnel working with recent isolates from humans or animals).	Commercially available.
Japanese Encephalitis	Inactivated vaccine (IND) <sup>2</sup>	Personnel who work directly and regularly with JE virus in the laboratory.	CDC. <sup>3</sup>
Measles	Live attenuated virus vaccine	Measles-susceptible personnel working with the agent or potentially infectious clinical materials.	Commercially available.
Meningococcal Meningitis	Purified polysaccharide vaccine	Personnel working regularly with large volumes or high concentrations of infectious materials (does not protect against infection with group B meningococcus).	Commercially available.



## B-1. RECOMMENDATIONS FOR IMMUNOPROPHYLAXIS OF PERSONNEL AT RISK—Continued

Description of disease	Product	Recommended for use in	Source of product
Plague	Inactivated vaccine	Personnel working regularly with cultures of <i>Yersinia pestis</i> or infected rodents or fleas.	Commercially available.
Poliomyelitis	Inactivated (IPV) and live attenuated (OPV) vaccines.	Polio-susceptible personnel working with the virus or entering laboratories or animal rooms where the virus is in use.	Commercially available.
Pox viruses (Vaccinia, Cowpox, or Monkey Pox viruses).	Live (lyophilized) vaccinia virus	Personnel working with orthopox viruses transmissible to humans, with animals infected with these agents, and persons entering areas where these viruses are in use.	CDC. <sup>3</sup>
Q Fever (Phase II) vaccine	Inactivated (IND) <sup>2</sup>	Personnel who have no demonstrable sensitivity to Q fever antigen and who are at high risk of exposure to infectious materials or animals.	USAMRIID. <sup>1</sup>
Rabies	Human diploid line cell inactivated vaccine.	Personnel working with all strains of rabies virus, with infected animals, or persons entering areas where these activities are conducted.	Commercially available.
Rift Valley Fever	Inactivated virus vaccine (IND) <sup>2</sup>	All laboratory and animal care personnel working with the agent or infected animals and all personnel entering laboratories or animal rooms when the agent is in use.	USAMRIID. <sup>1</sup>
Rubella	Live attenuated virus vaccine	Rubella-susceptible personnel, especially women, working with "wild" strains or in areas where these viruses are in use.	Commercially available.
Tuberculosis	Live, attenuated (BCG) bacterial vaccine.	BCG vaccine ordinarily is not used in laboratory personnel in the U.S.	Commercially available.
Tularemia	Live attenuated bacterial vaccine (IND) <sup>2</sup>	Personnel working regularly with cultures or infected animals or persons entering areas where the agent of infected animals are in use.	USAMRIID. <sup>1</sup>
Typhoid	Inactivated vaccine	Personnel who have no demonstrated sensitivity to the vaccine and who work regularly with cultures.	Commercially available.
Venezuelan equine (VEE) encephalitis.	Live attenuated (TC83) viral vaccine (IND) <sup>2</sup>	Personnel working with VEE and the Equine Cabassou, Everglades, Mucambo, and Tonate viruses, or who enter areas where these viruses are in use.	USAMRIID. <sup>1</sup>
Western equine encephalitis (WEE).	Inactivated vaccine (IND) <sup>2</sup> with WEE virus.	Personnel who work directly and regularly in the laboratory.	USAMRIID. <sup>1</sup>
Yellow Fever	Live attenuated (17D) virus vaccine.	Personnel working with virulent and avirulent strains of Yellow Fever virus.	Commercially available.

<sup>1</sup> For information, contact: United States Army Medical Materiel Development Activity, Fort Detrick, Frederick, MD 21701, telephone: (301) 663-7661.

<sup>2</sup> Investigational New Drug (IND).

<sup>3</sup> Clinical Medicine Branch, Division of Host Factors, Center for Infectious Disease, Centers for Disease Control, Atlanta, GA 30333, telephone: (404) 639-3356.

Source: Adapted from recommendations of the PHS Immunization Practices Advisory Committee and Biosafety in Microbiological and Biomedical Laboratories.

## Appendix C to Part 627—Laboratory Safety Inspection Checklist

C-1. The checklist that follows is not an exhaustive list of the items to consider when inspecting facilities where etiologic agents are used. It does provide some basic guidelines to remind safety and nonsafety professionals of the things that need to be considered in the laboratories they manage. The checklist should be used as follows: All area should be inspected using the general list in C-2. Certain items are optional, such as radiation safety. If no radioactive material is present in the room, then this would not be applicable. For BL-1 facilities the list in C-2 is adequate, while BL-2, BL-3, and BL-4 facilities must use the list in C-2 together with the appropriate list in C-3 to C-5.

## C-2. Basic checklist

## (a) Housekeeping

(1) Is the room free of clutter?

(2) Are all aisles from the work areas to the available exits maintained clear of obstructions?

(3) Are all safety equipment items unobstructed and ready for use?

(4) Is the room clean?

## (b) Fire safety

(1) Is the fire extinguisher hung in its proper place, ready for use, and unobstructed?

(2) Are there excess flammables located outside National Fire Protection Association (NFPA) approved cabinetry?

(3) Are all Class IA flammables that are in breakable containers in pint or smaller containers?

(4) Are all Class IB flammables that are in breakable containers in liter or smaller containers?

## (c) Chemical safety

(1) Are the chemicals stored with compatible materials?

(2) Have the chemical fume hoods been certified in the last 6 months?

(3) Are the eyewash and deluge shower unobstructed and ready for use?

(4) Is the eyewash and deluge shower tested regularly to document proper operation?

(5) Is the organic waste container maintained in a closed position?

(6) Are all reagents and solutions properly labeled?

(7) Is a spill kit within a reasonable distance from the work areas?

(8) Is appropriate protective clothing available for the chemical hazards present?

(9) Is there a written hazard communication program?

(10) Have the personnel in the laboratory been trained in the provisions and principles of the hazard communication program?

(11) Are MSDSs located where they are available to the laboratory workers?

(12) Is there a written chemical hygiene plan?

## (d) Radiation safety

(1) Are the radioactive materials stored double-contained?

(2) Is the containment for the radiation waste container adequate to preclude the spread of radiation?

(3) Are all containers appropriately labeled with radiation labels?

(4) Are all entrances to the room appropriately labeled?

## (e) Electrical safety

(1) Are excess extension cords being utilized?

(2) Are there any frayed cords in the room?

(3) Are there any cords on the floor across normal traffic patterns in the room?

## (f) General laboratory safety

(1) Are sharps discarded and destroyed in a safe manner?

(2) Are work surfaces decontaminated daily and after a spill?

(3) Is the appropriate attire worn by everyone in the room?

(4) Is there evidence that personnel eat, drink, smoke, or store food, drinks, or tobacco in the room?

(5) Was mouth pipetting observed?

(6) Are all gas cylinders secured and are all cylinders not in use capped?

(7) Are cylinders of oxidizers stored at least 20 feet from cylinders of flammable gases in the same room?

(8) Are the contents of the cylinders clearly labeled?



(9) Are the cylinders transported on appropriate dollies or hand trucks?

(10) Is there a written respiratory protection program where respirators are used?

(g) Etiologic agents

(1) Are all containers of etiologic agents appropriately labeled?

(i) Are freezers, refrigerators, and similar storage units labeled with the biohazard warning sign?

(ii) Are the storage and shipping containers adequate and properly labeled?

(2) Have all personnel been adequately trained in general microbiological techniques?

(3) Are laboratory doors kept closed when experiments are in progress?

(4) Are all operations conducted over plastic-backed absorbent paper or spill trays?

#### C-3. Biosafety level 2 supplemental checklist

(a) Are all floor drains filled with water or suitable disinfectant?

(b) Is the SOP for an etiologic agent spill signed by all personnel who work with etiologic agents in the room?

(c) If biological safety cabinets are used, have they been certified within the last year?

(d) Are the appropriate decontaminants available?

(e) Are all entrances to the laboratory posted with—

(1) The appropriate special provisions for entry?

(2) The universal biohazard symbol?

(3) The name and telephone number of the laboratory director or other responsible person?

(f) Is entry limited and restricted?

(g) Are gloves being worn when handling infected animals or infectious or toxic materials?

(h) Is eye and respiratory protection being worn in rooms where nonhuman primates are present?

(i) If materials are being transported off-site for decontamination, is the containment adequate?

#### C-4. Biosafety level 3 supplemental checklist

(a) Is laboratory clothing decontaminated before being sent to the laundry?

(b) Are all windows and penetrations through the walls and ceilings sealed?

(c) If biological safety cabinets are used, have they been certified within the last year?

(d) Are the appropriate decontaminants available?

(e) Are all entrances to the facility posted with—

(1) The appropriate special provisions for entry?

(2) The universal biohazard symbol?

(3) The name and telephone number of the laboratory director or other responsible person?

(f) Is entry limited and restricted?

(g) Are gloves being worn when handling infected animals or infectious or toxic materials?

(h) Is eye and respiratory protection being worn in rooms where nonhuman primates are present?

(i) Do the monitors indicate that the room is under negative pressure relative to all entrances?

(j) Are all vacuum lines protected with HEPA filters and liquid disinfectant traps?

(k) Is the autoclave being properly maintained and certified?

(l) Is the foot, elbow, or automatic handwash sink operating properly?

(m) Are all operations with etiologic agents being conducted inside biological safety cabinets or other approved engineering controls?

(n) Are all infected animals housed using appropriate primary containment systems?

(o) Do all personnel who enter rooms housing infected animals wear appropriate respiratory protection?

(p) Do personnel who exit rooms having infected animals leave their protective clothing in the animal and laboratory rooms?

(q) If available, has the UV pass box output been certified within the last 3 months?

#### C-5. Biosafety level 4 supplemental inspection checklist

(a) Precautions for all areas.

(1) Are all penetrations through the walls and ceilings sealed?

(2) Are the appropriate decontaminants available and used properly?

(3) Are all entrances to the facility posted with—

(i) The appropriate special provisions for entry?

(ii) The universal biohazard symbol?

(iii) The name and telephone number of the laboratory director or other responsible person?

(4) Is access to the laboratory controlled strictly and documented?

(5) Do the monitors indicate that the room is under negative pressure relative to all entrances?

(6) Are all vacuum lines protected with HEPA filters and liquid disinfectant traps?

(7) Is the autoclave being properly maintained and certified?

(8) Is the foot, elbow, or automatic handwash sink operating properly?

(9) Do the self-closing doors to the facility operate properly?

(10) Do personnel completely exchange street clothing for laboratory clothing before entry and shower upon exiting?

(11) Is the dunk tank disinfectant fresh and appropriate for the agents in use?

(b) Suit areas.

(1) Are all operations with etiologic agents conducted in Class I or II biological safety cabinets?

(2) Do the procedures in place ensure that, as much as possible, the contamination remains inside the cabinets (such as ensuring that everything removed from within the cabinets, such as gloves being worn, instruments, glassware, or similar items, are decontaminated or properly packaged first)?

(3) Are the Class I or II cabinets in the facility certified every 6 months?

(4) Does the suit decontamination shower have adequate appropriate decontaminant available?

(5) Has the suit decontamination shower been used or tested in the last month?

(6) Is the ventilated suit air supply and emergency air supply adequate and working properly?

(7) Is the emergency alarm system working properly?

(8) Are all of the one-piece positive pressure suits available for use in serviceable condition?

(9) Are infected animals housed in appropriate primary containment systems?

(10) Is the static pressure in the suit area negative to all surrounding areas?

(c) Nonsuit areas.

(1) Are all operations with etiologic agents conducted inside Class III biological safety cabinets?

(2) Were the Class III biological safety cabinets certified before initiating the current operation?

(3) Are all infected animals housed in Class III cabinet containment caging systems?

#### Appendix D to Part 627—Packing and Labeling Requirements for Shipment of Etiologic Agents

D-1. Packaging and Labeling of Etiologic Agents, from HHS publication No. (NIH) 88-8395.

D-2. Guidelines for the Air Shipment of Diagnostic Specimens, from the Air Transport Association of America, Cargo Services Division, 1709 New York Ave., NW., Washington, DC 20006.

#### Appendix E to Part 627—Permits for Importation and Shipments of Etiologic Agents

E-1. Permit Application to Import or Transport Agents or Vectors of Human Disease. Department of Health, Education and Welfare, PHS, CDC, Office of Biosafety, Atlanta, Georgia 30333.

E-2. Permit Application to Import Controlled Material; Import or Transport Organisms or Vectors. U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Veterinary Services, Federal Building, Hyattsville, Maryland 20782.

BILLING CODE 3710-08-M



## Appendix F to Part 627—Drawings, Biological Safety Cabinets

FIGURE H-1

## CLASS I BIOLOGICAL SAFETY CABINET

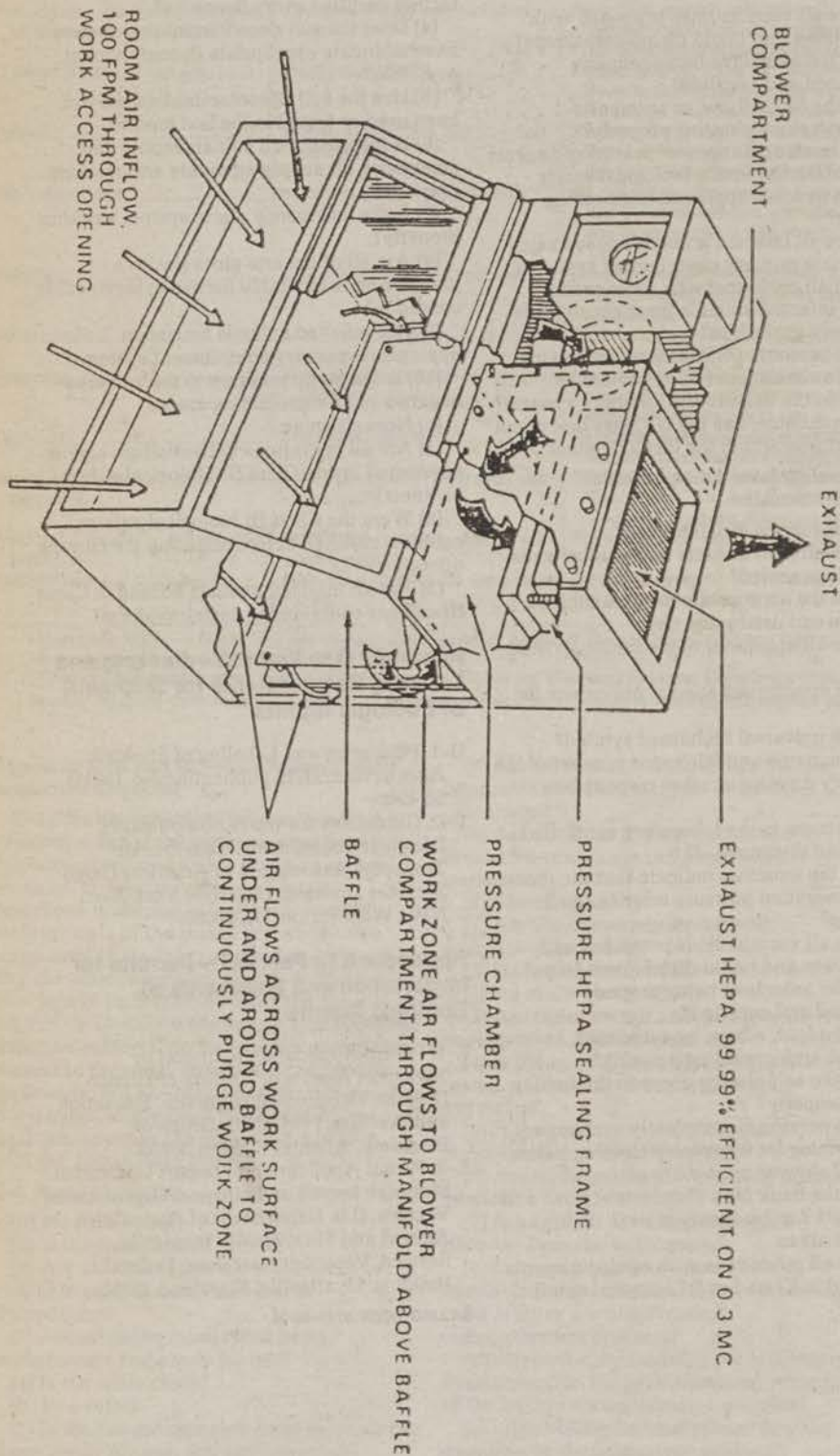




FIGURE H-2

CLASS II BIOLOGICAL SAFETY CABINET

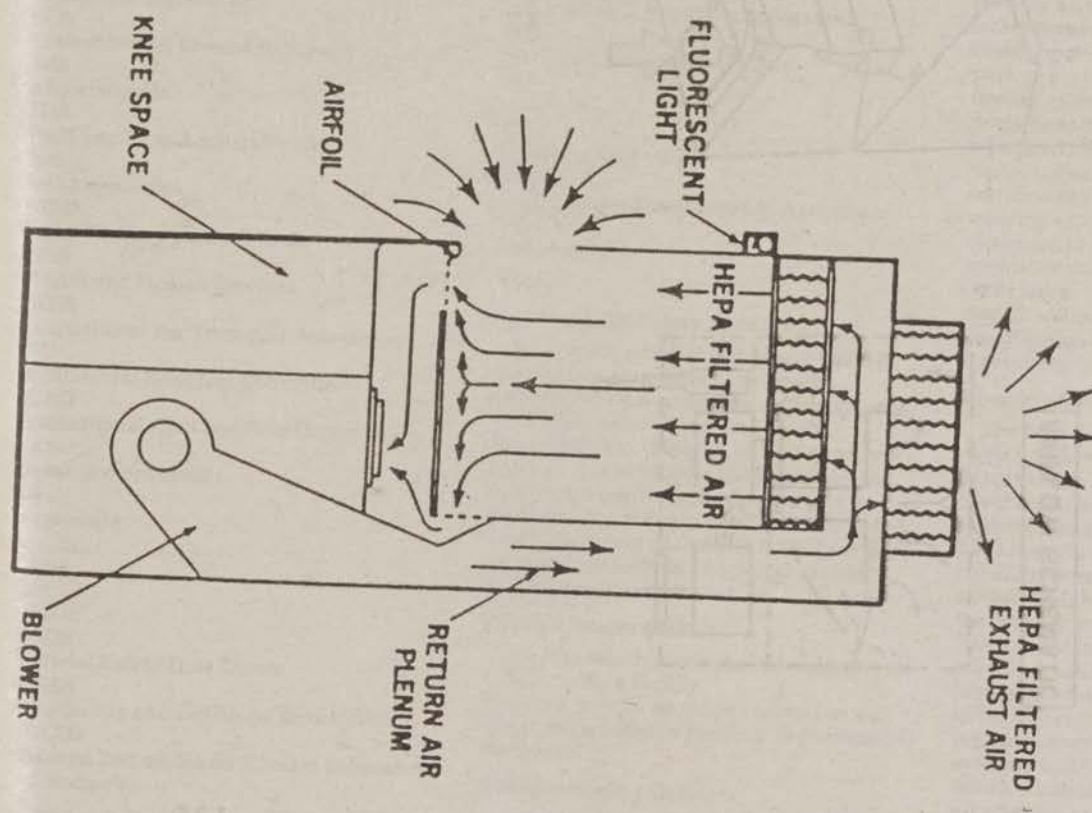
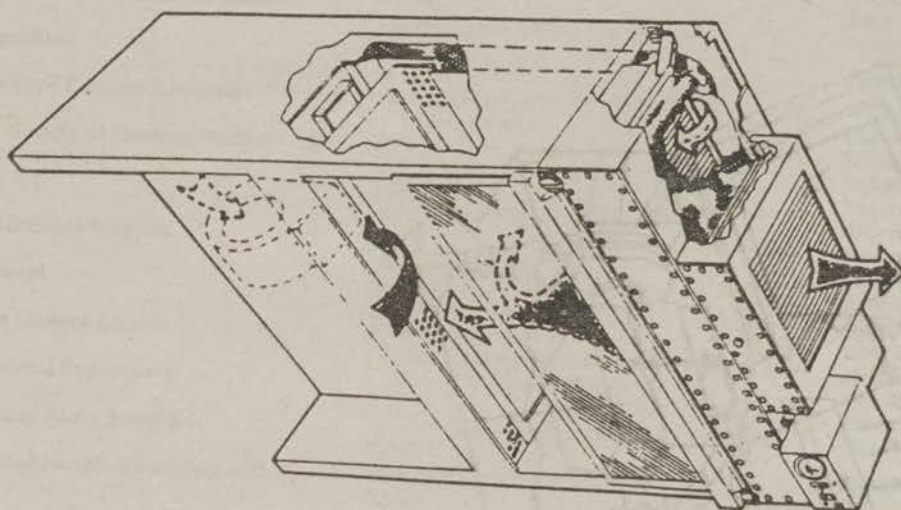
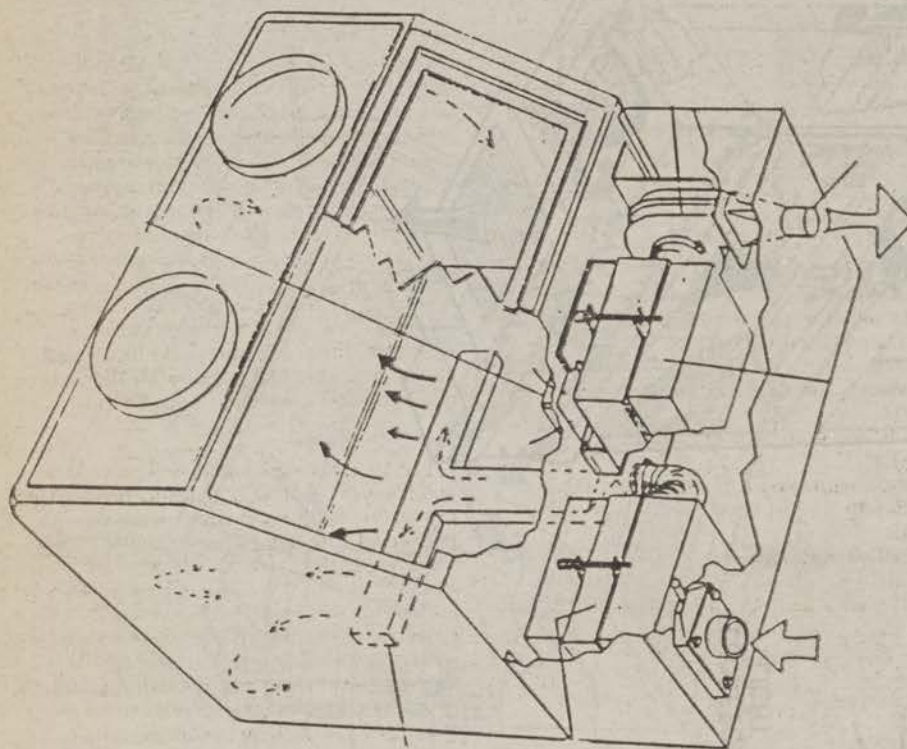
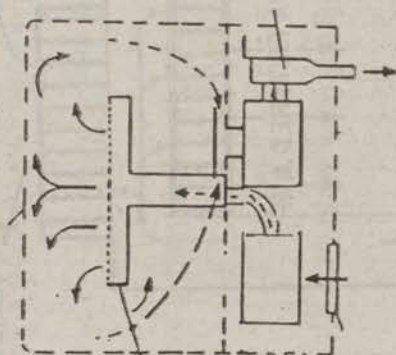




FIGURE H-III  
CLASS III BIOLOGICAL SAFETY CABINET



AIRFLOW SCHEMATIC



BILLING CODE 3710-06-C



**Appendix G to Part 627—Glossary****Abbreviations**

AIHA  
American Industrial Hygiene Association  
AMC  
United States Army Materiel Command  
ANSI  
American National Standards Institute  
AR  
Army Regulation  
ATCC  
American Type Culture Collection  
ASHRAE  
American Society of Heating, Refrigerating, and Air Conditioning Engineers, Inc.  
BDP  
Biological Defense Program  
BL  
biosafety level  
CDC  
Centers for Disease Control  
CFR  
Code of Federal Regulations  
DA PAM  
Department of Army Pamphlet  
DHEW  
Department of Health, Education, and Welfare  
DOD  
Department of Defense  
DOT  
Department of Transportation  
DNA  
deoxyribonucleic acid  
EPA  
Environmental Protection Agency  
EtO  
ethylene oxide  
FDA  
Food and Drug Administration  
fpm  
feet per minute  
HEPA  
high efficiency particulate air  
HHS  
Health and Human Services  
IATA  
International Air Transport Association  
IBC  
Institutional Biosafety Committee  
ICAO  
International Civil Aviation Organization  
lfpm  
linear feet per minute  
LS  
large-scale  
m  
meter  
min  
minute  
MSDS  
Material Safety Data Sheets  
MSHA  
Mine Safety and Health Administration  
NCCLS  
National Committee for Clinical Laboratory Standards  
NCI  
National Cancer Institute  
NEPA  
National Environmental Policy Act  
NFPA  
National Fire Protection Association  
NIH

National Institutes of Health  
NIOSH  
National Institute for Occupational Safety and Health  
NRC  
Nuclear Regulatory Commission  
NSF  
National Sanitation Foundation  
OSHA  
Occupational Safety and Health Administration  
pH  
the negative logarithm of hydrogen ion concentration  
PHS  
Public Health Service  
PPE  
personal protective equipment  
ppm  
parts per million  
psi  
pounds per square inch  
RCRA-Listed  
Resource Conservation Recovery Act of 1976  
Listed Hazardous Waste  
RDTE  
research, development, test, and evaluation  
RPO  
Radiation Protection Officer  
SALS  
Subcommittee on Arbovirus Laboratory Safety  
SAR  
supplied-air respirator  
SCBA  
self-contained breathing apparatus  
SOP  
Standing Operating Procedure  
TD  
to deliver  
TLV  
threshold limit value  
USDA  
United States Department of Agriculture  
UV  
ultraviolet

**Terms****Approved respiratory protection**

Equipment which is tested and listed as satisfactory according to standards established by a competent authority (such as NIOSH, Mine Safety and Health Administration (MSHA), or host country agency) to provide respiratory protection against the particular hazard for which it is designed. For military agent protection, DA and Department of Defense (DOD) are the approval authorities. (Approval authority may be specified by law.)

**Biocontainment area**

An area which meets the requirements for a BL-3 or BL-4 facility. The area may be an entire building or a single room within a building. See subpart G for details.

**Biological Safety Cabinets**

Engineering controls designed to enable laboratory workers to handle infectious etiologic agents and to provide primary containment of any resultant aerosol. There are three major classes of cabinets (I, II, and III) and several subclasses of class II cabinets. Each type of cabinet provides a

different degree of protection to personnel and to the products handled inside them. The various classes of cabinets are described in detail in subpart H.

**Biosafety Level 1**

The facilities, equipment, and procedures suitable for work involving agents of no known or of minimal potential hazard to laboratory personnel and the environment.

**Biosafety Level 2**

The facilities, equipment, and procedures applicable to clinical, diagnostic, or teaching laboratories, and suitable for work involving indigenous agents of moderate potential hazard to personnel and the environment. It differs from BL-1 in that (1) laboratory personnel have specific training in handling pathogenic agents, (2) the laboratory is directed by scientists with experience in the handling of specific agents, (3) access to the laboratory is limited when work is being conducted, and (4) certain procedures in which infectious aerosols could be created are conducted in biological safety cabinets or other physical containment equipment.

**Biosafety Level 3**

The facilities, equipment, and procedures applicable to clinical, diagnostic, research, or production facilities in which work is performed with indigenous or exotic agents where potential exists for infection by aerosol, and the disease may have serious or lethal consequences. It differs from BL-2 in that (1) more extensive training in handling pathogenic and potentially lethal agents is necessary for laboratory personnel; (2) all procedures involving the manipulation of infectious material are conducted within biological safety cabinets, other physical containment devices, or by personnel wearing appropriate personal protective clothing and devices; (3) the laboratory has special engineering and design features, including access zones, sealed penetrations, and directional airflow; and (4) any modification of BL-3 recommendations must be made only by the commander.

**Biosafety Level 4**

The facilities, equipment, and procedures required for work with dangerous and exotic agents which pose a high individual risk of life-threatening disease. It differs from BL-3 in that (1) members of the laboratory staff have specific and thorough training in handling extremely hazardous infectious agents; (2) laboratory personnel understand the primary and secondary containment functions of the standard and special practices, containment equipment, and laboratory design characteristics; (3) access to the laboratory is strictly controlled by the institute director; (4) the facility is either in a separate building or in a controlled area within a building, completely isolated from all other areas of the building; (5) a specific facility operations manual is prepared or adopted; (6) within work areas of the facility, all activities are confined to Class III biological safety cabinets or Class I or Class II biological safety cabinets used in conjunction with one-piece positive pressure personnel suits ventilated by a life support



system; and (7) the maximum containment laboratory has special engineering and design features to prevent microorganisms from being disseminated to the environment.

#### Building

A structure that contains the requisite components necessary to support a facility that is designed according to the required biosafety level. The building can contain one or more facilities conforming to one or more biosafety level.

#### Confirmed Exposure

Any mishap with a BDP agent in which there was direct evidence of an actual exposure such as a measurable rise in antibody titer to the agent or a confirmed diagnosis of intoxication or disease.

#### Etiologic Agents

Any viable microorganism, or its toxin which causes or may cause human disease, including those agents listed in 42 CFR 72.3 of the Department of Health and Human Services regulations, and any agent of biological origin that poses a degree of hazard similar to those agents.

#### Facility

An area within a building that provides appropriate protective barriers for persons working in the facility and the environment external to the facility, and outside of the building.

#### HEPA Filter

A filter which removes particulate matter down to submicron sized particles from the air passed through it with a minimum efficiency of 99.97 percent. While the filters remove particulate matter with great efficiency, vapors and gases (for example, from volatile chemicals) are passed through without restriction. HEPA filters are used as the primary means of removing infectious agents from air exhausted from engineering controls and facilities.

#### Human Lethal Dose

The estimated quantity of a toxin that is a minimum lethal dose for a 70 kilogram individual based upon published data or upon estimates extrapolated from animal toxicity data.

#### Commander or Institute Director

The commander or institute director of an Army activity conducting RDTE with BDP etiologic agents, or the equivalent, at a research organization under contract to the BDP.

#### Institution

An organization such as an Army RDTE activity (institute, agency, center, and so forth) or a contract organization such as a school of medicine, or research institute that conducts RDTE with BDP etiologic agents.

#### Laboratory

An individual room or rooms within a facility that provide space in which work with etiologic agents can be performed. It contains all of the appropriate engineering features and equipment required at a given biosafety level to protect personnel working in it and the environment external to the facility.

#### Large-Scale Operations

Research or production involving viable etiologic agents in quantities greater than 10 liters of culture.

#### Maximum Containment Area

An area which meets the requirements for a BL-4 facility. The area may be an entire building or a single room within the building. See chapter 7 for details.

#### Molded Masks

Formed masks that fit snugly around the mouth and nose and are designed to protect against a nontoxic nuisance level of dusts and powders. These do not require approval

by NIOSH or MSHA. Masks made of gauze do not qualify.

#### Potential Accidental Exposure

Any accident in which there was reason to believe that anyone working with a BDP agent may have been exposed to that agent, yet no measurable rise in antibody titer or diagnosis of intoxication or disease was made. However, the high probability existed for introduction of an agent through mucous membranes, respiratory tract, broken skin, or the circulatory system as a direct result of the accident, injury, or incident.

#### Resource Conservation Recovery Act of 1976 Listed Hazardous Waste

The waste materials listed by the Environmental Protection Agency under authority of the RCRA for which the agency regulates disposal. A description and listing of these wastes is located in 40 CFR part 261.

#### Suite

An area consisting of more than one room, designed to be a functional unit in which entire operations can be facilitated. Suites may contain a combination of laboratories or animal holding rooms and associated support areas within a facility that are designed to conform to a particular biosafety level. There may be one or more suites within a facility.

#### Toxin

Toxic material of etiologic origin that has been isolated from the parent organism.<sup>1</sup>

**Kenneth L. Denton,**

*Army Federal Register Liaison Officer.*

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**BILLING CODE 3710-06-M**

<sup>1</sup> The publication "Bacterial Toxins: a Table of Lethal Amounts," (Gill, D.M. (1982) Microbiological Reviews, 46:88-94) contains a useful table of mammalian toxicities of numerous toxins.



# Equal Employment Opportunity Commission

Friday  
April 10, 1992

## Part IV

## Equal Employment Opportunity Commission

29 CFR Part 1614

Federal Sector Equal Employment  
Opportunity; Rule and Proposed Rule



## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1614

RIN 3045-AA11

### Federal Sector Equal Employment Opportunity

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the way that federal agencies and EEOC will process administrative complaints and appeals of employment discrimination filed by federal employees and applicants for federal employment. The new regulation will enable quicker, more efficient processing of complaints and promote impartial, fair and early resolution of complaints.

**EFFECTIVE DATE:** This part will become effective on October 1, 1992.

**FOR FURTHER INFORMATION CONTACT:**

Nicholas M. Inzeo, Associate Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, at (202) 663-4670, FTS 989-4670 or TDD (202) 663-7026. This regulation is also available in the following alternative formats: large print, braille, audio tape and electronic file on computer disk. Requests for this regulation in an alternative format should be made to the Office of Equal Employment Opportunity at (202) 663-4395, FTS 989-4395 or TDD (202) 663-4399.

**SUPPLEMENTARY INFORMATION:** Pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (1978), Executive Order 12144, 44 FR 37193 (1979) and Executive Order 12106, 44 FR 1053 (1979), all responsibility for the administration and enforcement of equal opportunity in federal employment that was previously vested in the Civil Service Commission and the Secretary of Labor, was transferred to the Equal Employment Opportunity Commission (EEOC). EEOC is authorized to issue rules, regulations, orders and instructions pursuant to title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(b); the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(b); the Rehabilitation Act, of 1973, 29 U.S.C. 794a(a)(1); the Fair Labor Standards Act 29 U.S.C. 201 *et seq.*, Executive Order 12067, 43 FR 23967 (1978) and Executive Order 11478, 34 FR 12985 (1969), as amended by Executive Order 12106.

Pursuant to the foregoing authorities, the EEOC published a Notice of Proposed Rulemaking, 54 FR 45747 (1989), proposing a restructured

complaint process for newly-filed federal sector EEO complaints that would be located at 29 CFR part 1614 ("part 1614"). The existing complaint process, located at 29 CFR part 1613 ("part 1613"), was created by the Civil Service Commission in 1972, 37 FR 22717 (1972), and subsequently transferred to EEOC. It has been criticized in the Supreme Court's decision in *Chandler v. Roudebush*, 425 U.S. 840 (1976), as well as by U.S. General Accounting Office audit reports, a report of the Assistant Secretaries for Management Group, and the House Employment and Housing Subcommittee's Report, "Over-hauling the Federal EEO Complaint Processing System: A New Look at a Persistent Problem." H.R. Rep. No. 456, 100th Cong., 1st Sess. (1987). The proposal to adopt part 1614 constituted EEOC's response to these critical commentaries.

EEOC received 56 comments on proposed part 1614 during the comment period. Thirty-six were submitted by federal agencies or components of federal agencies, eight were submitted by private individuals, six were submitted by civil rights organizations and professional associations, five were submitted by federal employee unions and one was submitted by a member of Congress. The comments are analyzed below in two sections. First, the major features of the new part are discussed along with the comments on them. Then, the comments on individual sections are discussed in a section-by-section analysis.

On November 21, 1991, President Bush signed the Civil Rights Act of 1991, Public Law No. 102-166 (1991). That law made a number of statutory changes affecting the processing of administrative complaints and notices of rights that agencies and the Commission are required by these regulations to give the complainants. The Commission has included in this final rule those provisions of the Act affecting administrative processing and notification of rights.

### Major Features

#### A. Organization

Part 1614 is organized differently than part 1613. Part 1613 contains separate subparts for each type of complaint, e.g., title VII complaints, mixed case complaints, age complaints, class complaints, handicap complaints, and old mixed case complaints. Part 1614 attempts to avoid repetition and extensive cross-referencing by consolidating the complaint processing procedures as much as possible. The new part is organized into six subparts. Subpart A concerns the agencies'

programs for promoting equal employment opportunity and the procedures for agency processing of individual complaints of discrimination. Subpart B provides additional provisions that are applicable to the processing of particular types of complaints (i.e., ADEA, Equal Pay Act, Rehabilitation Act, class). Subpart C explains the relationship between the EEO process and the negotiated grievance process and between the EEO process and appeals to the Merit Systems Protection Board. Subpart D describes appeals to EEOC and the right to file civil actions under each statute administered by EEOC. Subpart E sets forth EEOC's policy on remedies and relief when discrimination has occurred. Subpart F contains miscellaneous provisions of general applicability to agency EEO programs. The overwhelming majority of comments addressing this issue supported the revised organization.

#### B. Pre-complaint Processing

As under part 1613, a person who believes he or she has been retaliated against or discriminated against on the basis of race, color religion, sex, national origin, age, or handicap must first seek counseling under part 1614 from the alleged discriminating agency and file a written complaint with that agency. Proposed part 1614 contained the same 30-day time limit for contacting a counselor as the existing part 1613 but invited comments on whether that time period should be enlarged. Many of the non-agency commenters advocated lengthening the time period to as much as 180 days arguing that 30 days was insufficient to reflect, secure advice or realize the impact of a discriminatory action, that the relatively short period was screening out many meritorious complaints and that there should be a symmetry between the private sector time limit for filing a charge and the federal sector time limit for contacting a counselor. Most, but not all, of the agency commenters suggested retaining the 30-day limit reasoning that the existing liberal extension provision adequately protects the rights of federal employees and applicants and that any lengthening of the time period would introduce further delays, undermine quick resolution and result in faded memories, lost documents and unavailable witnesses.

We do not believe that the analogy between the private sector filing period and the federal sector counseling time limit is apt. Private employees must actually file a complaint within 180 days, not just contact an EEOC office



about doing so. Private employees may have to travel many miles or use the mail to file a charge with EEOC while federal employees only have to contact a counselor by telephone or often merely visit a counselor who is located in the same work place in order to comply with the time limit. Moreover, a comparison of private sector charge filings and federal sector complaint filings indicates that federal employees file complaints at a rate three times greater than private sector employees file charges. Further, the earliest possible contact with a counselor aids resolution of disputes because positions on both sides have not yet hardened. Therefore, we believe a significant lengthening of the pre-complaint period is not justified. Nonetheless, some potential complainants may not be able to comply with the 30-day limit for valid reasons. Consequently, EEOC has decided to modify the time limits for seeking counseling.

Part 1614 provides that an employee or applicant must generally contact a counselor within 45 days of the discriminatory event but also requires an agency to extend the time limit for contacting a counselor when warranted by the circumstances. The reasons for extending the 45-day time period are identical to those in current § 1613.214(a).

In addition, proposed part 1614 limited the time spent in counseling to 30 days with the possibility of an extension for an additional 60 days if agreed to by both parties. Many agency commenters noted that counseling presented a very important opportunity to resolve complaints and that agencies with formal dispute resolution procedures needed more than 30 days to use them. In order to encourage and accommodate such voluntary efforts, part 1614 now provides that the counseling period will be 90 days where an agency has an established dispute resolution procedure available during counseling and the employee or applicant chooses to use it. We believe that the 60-day extension provision applicable in all other situations will accommodate voluntary settlement efforts whenever both parties agree to it without unduly delaying further processing.

#### *C. Agency Processing of Individual Complaints*

As under part 1613, part 1614 requires an agency to acknowledge receipt of a complaint and, if it is properly filed, investigate it. As proposed, part 1614 eliminated the informal adjustment and proposed disposition stages of part 1613 and postponed the hearing to the appellate stage, *i.e.*, until after the

agency had issued its notice of final action. It also required the agency to complete its investigation and issue a notice of final action on a complaint within 180 days of its filing. Because agencies' responsibilities in the 180-day period were limited to investigation, settlement attempts and issuance of a notice of final action, agencies were expected to complete investigations within that time limit. One major reason for proposing part 1614 was to eliminate the time delays and backlogs frequently associated with part 1613 agency complaint processing by limiting agency processing to 180 days and by reducing the number of decision making levels.

Some agencies and non-agency commenters doubted that agencies could complete investigations within 180 days and speculated that agencies may decide not to investigate, causing complainants to inundate EEOC with appeals. We believe that agencies can complete investigations within 180 days and that agencies will have sufficient incentive to investigate complaints. The most recent federal sector statistics reported by the agencies to EEOC indicate that the average time it takes an individual complaint to reach the proposed disposition stage under part 1613 is 180 days or less in a majority of the agencies. Since under part 1614 the proposed disposition and informal adjustment are being eliminated from the agency process, agencies should be able to complete the investigation under part 1614 in the same amount of time it takes to reach the proposed disposition stage under part 1613. This indicates that the 180-day time frame can be met.

A number of agencies, and some other commenters, raised questions about or objected to EEOC conducting reimbursable supplemental investigations and hearings on appeal. Some agencies indicated that they would not agree to sign a memorandum of understanding permitting EEOC to recover reimbursements, and would oppose any effort by EEOC to collect reimbursements. The questions and objections have led EEOC to revise the regulation and retain the traditional distinction between the complaint and appellate process, *i.e.*, that factual development through investigation and hearing will occur at the complaint level and review by EEOC will occur at the appellate level. Commenters uniformly saw the hearing process as an appropriate method of developing a complete and fair record.

The final regulation retains the requirement that investigations be completed within 180 days. In order to insure that complete and fair

investigations will be conducted within the 180-day limit, the regulation relies on the use of adverse inferences by the Commission and its administrative judges, and permits both parties to obtain findings of fact and conclusions of law without a hearing, a type of summary disposition, for some or all issues in a complaint. The summary disposition process will encourage agencies to develop a complete investigation in order to save resources.

As under part 1613, agencies will still want to have the first opportunity to resolve a complaint and investigation is necessary to determine the likelihood of success and potential liability before a settlement offer is made. The use of adverse inference and summary disposition is designed to enable the Commission to achieve the goal that it sought to achieve in proposed part 1614 by providing for remands or supplemental investigations on appeal, *i.e.*, a method to assure that agencies will conduct a complete and fair investigation of complaints within the 180-day timeframe. As under proposed part 1614, the agency is required to complete the investigation within 180 days unless it has secured the agreement of the complainant to extend processing for up to an additional 90 days.

The new part allows agencies a large degree of flexibility in the investigation of complaints. The agency may use a variety of investigative and dispute resolution methods to complete complaint processing within 180 days. The agency can use an exchange of letters or position papers, interrogatories, investigation, fact-finding conference or any other method or combination of methods that will lead to the development of a complete factual record.

Complainants dissatisfied with the agency's dismissal of all or part of the complaint can immediately appeal from the agency's dismissal, and the Commission will establish an expedited appeals process to insure that complaint processing is not unduly delayed by an improper dismissal. Where an appeal from a partial dismissal is filed, and the dismissal is reversed by EEOC's Office of Federal Operations (OFO), the matter will be sent back to the agency for completion of the investigation. The time frame for completing the investigation of the accepted portion of the complaint will be stayed pending a decision on the appeal. Agencies may, but are not required to, investigate during this time period.

When an agency accepts a complaint and later determines that there are



reasons for dismissal of a complaint, e.g., failure to cooperate or to accept full relief, there is no time limit placed on the agency (other than the requirement to complete the investigation within 180 days) as to when the dismissal must occur. The complainant retains the right to appeal such dismissals and, if the complainant prevails on the appeal, the complaint will be remanded to the agency with instructions to complete the investigation within a prescribed period of time. By providing for an appeal from a dismissal or partial dismissal, the Commission seeks to design an administrative process that operates efficiently. When, on appeal, the dismissal of a portion of a complaint is upheld but the remainder of the complaint is to be processed administratively, the Commission does not intend to force the complainant to proceed to court on the dismissed portion at that time. Instead, the Commission believes that the complainant can wait until a final decision is issued by the agency or the Commission on the merits of the remainder of the complaint.

Complainants may request a hearing after 180 days has elapsed from the filing of the complaint. Within 180 days from the filing of the complaint, the agency must complete its investigation and provide a copy of the complaint file to the complainant. The complainant will be notified at that time that he or she can request a hearing by an EEOC administrative judge or, alternatively, an immediate final decision by the employing agency. While the regulation requires that the complaint file and the notice be given to the complainant, the agency is also encouraged, but not required, to prepare a summary or report of investigation and also provide that to the complainant. If the complainant requests a final decision or the 30-day period elapses without the individual requesting a hearing, the agency will have 60 days to issue the decision. Where a hearing is requested, it will be conducted in the same manner as in proposed part 1614. The administrative judge will issue findings of fact and conclusions of law following the hearing and, where a finding of discrimination is made, an appropriate remedy will be ordered. Because the hearing will take place at the agency level, the agency will be given the same opportunity that it now has under part 1613 to issue a final decision, but must do so within 60 days of receipt of the administrative judge's findings and conclusions. The administrative judge's findings and conclusions will become the final

decision if the agency does not issue its own decision within 60 days.

Under proposed part 1614, the administrative judge issued proposed findings of fact and conclusions of law that were reviewed by the Office of Review and Appeals (ORA), the predecessor of the new Office of Federal Operations, which either adopted, rejected or modified those findings and conclusions. Many of the civil rights organizations, employee unions, individual commenters and some of the agencies objected to the non-binding nature of the administrative judge's findings and conclusions and the automatic review of the administrative judge's findings and conclusions by ORA as unnecessary and time-consuming. Some suggested that these findings and conclusions should be final unless appealed further. The reason for having recommended findings and conclusions in the proposed provision was to ensure quality and consistency among the administrative judges' decisions. We believe that those concerns are adequately protected when the agency has the opportunity to modify or reject the findings and conclusions and the complainant has the opportunity to appeal the final decision to EEOC. Accordingly, part 1614 now provides that the administrative judge will issue findings and conclusions, which will become final unless the agency rejects or modifies them. After the final decision of the agency is issued, or the findings and conclusions become final, the complainant may appeal to the Commission by filing an appeal with the Office of Federal Operations (OFO) to obtain appellate review of the agency's final decision. Either party can seek reconsideration by the Commission of an OFO decision or the appellant can file a civil action in federal court. As under part 1613, decisions signed by the Executive Officer on behalf of the Commission will have precedential value.

Many commenters suggested that the Commission should place time limits on its processing of complaints. With the change in the process so that the hearing will remain at the agency level, rather than being part of a multi-step appellate process, the Commission believes that a 180-day time limit can be placed on the administrative judge's processing of a complaint. Section 1614.109(g) now provides that, within 180 days of receipt by the EEOC of a request for a hearing, an administrative judge will issue findings of fact and conclusions of law on the merits of the complaint.

#### *D. Appellate Processing by EEOC*

If the complainant wishes to pursue the matter beyond the agency level, he or she may file a civil action in federal district court or may appeal to the EEOC from the decision of an agency to dismiss an allegation in a complaint or from a final decision of the agency.

In proposed part 1614, EEOC would have reviewed the agency record when an appeal was filed to determine if the record was adequate for decision. If it was not, EEOC would have supplemented the agency investigation by various methods. It could have remanded part or all of the matter to the agency for further investigation and drawn an adverse inference if the agency failed to supplement the record within the time specified by EEOC or it could have referred the matter to an EEOC field office for investigation and required that the agency reimburse EEOC for the investigation. If an agency failed to develop an adequate record, the Commission could also have sent notice of this deficiency to an appropriate agency official or congressional committee or taken other appropriate action. Once EEOC had determined the record was complete, it would have notified the parties and the complainant would have had 15 days within which to request a hearing.

Many commenters objected to the delayed opportunity to request a hearing and the potentially time-consuming initial review of the record by EEOC, arguing that it imposed needless obstacles to obtaining a hearing and that the preliminary review was unnecessary if a hearing were held. Some agencies also objected to the preliminary review of the record by EEOC and some objected to the proposed reimbursement and reports to Congressional committees when inadequate records were produced by the agency.

In view of these comments, as explained above, we have revised the proposed appellate process to eliminate any reimbursable investigations at that stage and to move the hearing back to the agency level. This approach will permit all factual development to occur at the initial stages of a complaint and will eliminate any perceived obstacles to a hearing. As under part 1613, the Commission will retain the right to supplement the record of appeal. It is intended that this provision will be used only in rare instances to avoid a miscarriage of justice. The right to a hearing after an investigation is intended to permit the parties to put all relevant information in the record. The



right to a hearing also puts the burden on the parties to ensure that the record is complete. The Commission does not intend its revised authority to supplement the record to substitute for the parties' responsibilities to develop the record.

By shortening the agency processing time, providing the right to discovery at hearings, and, when appropriate, independently reviewing the agency's decision, EEOC has attempted to eliminate unnecessary delays and to correct any perceived conflict of interest or unfairness in the current part 1613 practice of agency self-investigation.

#### E. Coverage of The Rehabilitation Act

In a change from § 1613.701(b), § 1614.103 eliminates coverage of units in the legislative and judicial branches and restricts the coverage of part 1614, for purposes of the Rehabilitation Act, to military departments as defined in 5 U.S.C. 102, executive agencies as defined in 5 U.S.C. 105, the U.S. Postal Service, the Postal Rate Commission and the Tennessee Valley Authority. This definition of EEOC's charge processing jurisdiction is based on the plain language of section 501 of the Rehabilitation Act, which limits coverage to departments, agencies and instrumentalities in the executive branch, and brings the regulation into conformity with a recent decision of a United States Court of Appeals. In *Judd v. Billington*, 863 F.2d 103 (D.C. Cir. 1988), the court held that section 791 of the Rehabilitation Act "applies only to employees in the executive branch. See 29 U.S.C. 791(b)." 863 F.2d at 105. A couple of commenters urged us not to abide by this decision. The Commission, however, already acknowledged and adopted the *Judd* decision in *Faucette v. Kennickell*, Request No. 05880888 (March 1, 1989). Because the Commission already decided this issue, we are not reversing that decision by regulation.

The former Civil Service Commission had authority to issue regulations covering competitive positions in legislative and judicial branch agencies, 5 U.S.C. 7153; however, that authority passed, not to EEOC, but to the Office of Personnel Management in 5 U.S.C. 7203. EEOC has requested that the Office of Personnel Management issue a regulation under section 7203 extending regulatory coverage of the Rehabilitation Act to competitive positions in the legislative and judicial branches. The Office of Personnel Management has responded by stating that it does not believe it has authority under the Rehabilitation Act to issue such a regulation. In addition, EEOC has

asked the Interagency Committee on Handicapped Employees to recommend a legislative change to section 501 of the Rehabilitation Act to provide competitive employees of legislative and judicial branch agencies with a remedy under the Rehabilitation Act.

#### F. Reassignment Under The Rehabilitation Act

The EEOC has taken the position that, under certain circumstances, an agency is required by section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, and EEOC's implementing regulations to reassign an employee as a reasonable accommodation. *Ignacio v. United States Postal Service*, Petition No. 03840005 (Sept. 4, 1984), *upheld*, 30 M.S.P.R. 471 (Spec. Panel 1986). The courts have not embraced this position. Congress intended the federal government to be a model employer of the handicapped and EEOC believes that reassignment of employees with disabilities who can no longer perform in their positions because of a disability is a necessary component of that responsibility. EEOC, therefore, proposed a new § 1614.203(g) imposing a duty to reassign employees with handicaps, in appropriate circumstances, as part of an agency's affirmative action obligation under section 501.

It should be noted that the recently enacted Americans with Disabilities Act of 1990, which prohibits private employers from discriminating on the basis of disability when making employment decisions, includes a provision identifying reassignment as a reasonable accommodation when an employee is no longer able to perform a job. EEOC sees this as a clear expression of the intent of Congress on the issue of reassigning workers with disabilities and believes the federal government, in its role as model employer, should do no less.

The Supreme Court has recognized a distinction in the Rehabilitation Act's civil rights provisions between nondiscrimination and affirmative action. In *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979), the court contrasted the "evenhanded treatment of qualified handicapped persons" required by section 504 with the "affirmative efforts to overcome the disabilities caused by handicaps" required by section 501 and noted the requirements of the latter section for affirmative action program plans that describe how the special needs of handicapped employees are being met. The Court reiterated in *Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1985), the distinction between the

nondiscriminatory reasonable accommodations required by section 504 and the affirmative action required by section 501 to effect substantial changes, adjustments and modifications in existing personnel practices. Section 501 requires each agency to submit an affirmative action program plan for the hiring, placement and advancement of handicapped individuals including a description of the extent to which and methods whereby the special needs of handicapped individuals are being met.

EEOC can require that agencies utilize reassignment as a method of meeting the special needs of handicapped employees. As a special affirmative action requirement, the reassignment obligation would not be a component of the statute's reasonable accommodation requirement. Because this is a new provision implementing the affirmative action requirements of section 501 only, the case law interpreting reasonable accommodation would be inapplicable. Thus, cases involving reassignment would rely on this new provision and not the reasonable accommodation regulation or case law in determining the proper legal standards for such reassignments under section 501.

The majority of the individual commenters, civil rights organizations and employee unions agreed with the proposal. The majority of agency commenters objected to the proposal on the basis that it exceeded EEOC's authority, was inconsistent with the case law and was impractical, and that the language of the proposed regulation was inconsistent with the language in the preamble describing its operation.

As stated above, EEOC believes that reassignment deriving from an agency's affirmative action obligation is consistent with the statute, the applicable case law and EEOC's authority to issue implementing regulations. The case law cited by the agencies involved the issue of reasonable accommodation, often under section 504 of the Rehabilitation Act, and in many cases was premised on a reading of EEOC's regulations that the courts found did not specifically require reassignment. The cited case law was not on point and does not, in our opinion, provide persuasive support for the objections raised.

Any difference in language between the preamble and the proposed regulation is explained by the purposes of these parts of the NPRM. The requirement is that agencies reassign employees with handicaps in the circumstances indicated. The agency should consider reassignment whenever an employee with handicaps can no



longer perform his or her job but must reassign such an employee whenever the circumstances described in the regulation are met. Although the preamble characterized this as "consideration," it explained the process of reassignments and required that they be made whenever the agency discovers during its "consideration" that the circumstances described in the regulation apply.

Some agencies with multiple components within the same commuting area and the Office of Personnel Management argued that it would be impractical and extremely difficult to reassign employees from one agency component to another where such components have separate personnel authority. As a result of these comments, we have revised the section to only require reassignment within the part(s) of the agency located in the same commuting area that share the same personnel appointing authority. We have also clarified that only funded vacancies need be considered, i.e., vacancies that the agency intended to fill.

The Commission has added a sentence to the reassignment section distinguishing between vacancies that have been posted and those that have not. The Commission believes that such a distinction is necessary to deal with the expectations of other individuals who have applied or are planning to apply for vacancies that have been posted. Thus, when a notice or announcement seeking applications for a specific vacancy has been posted prior to the time the agency has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, the agency is not obligated by this section to reassign the individual to that position, but must consider the individual on an equal basis with those who have already applied for the position. Under this circumstance, however, the obligation to reassign under this section still applies to any funded vacancies that have not been posted. Thus, when consideration for a posted vacancy does not result in selection of the individual, the agency is obligated under this section to consider the individual for other appropriate vacancies.

Some commenters also raised objections to the requirement for reassignment to a lower graded position where no vacancy at the employee's grade level exists. Some unions, civil rights organizations and individual commenters argued that without any limitations, agencies could offer the

lowest-graded vacant position and undermine the requirement. In order to meet this concern, the revised section requires reassignment to the highest available vacancy below the employee's current grade, when no vacancy exists at the current grade. Reassignment to a higher-graded position is not required under this section.

Agencies objected that they could only place an employee in a lower graded position pursuant to adverse action procedures and, therefore, could not comply with this requirement. A few agencies also objected that the reassignment requirement in this section would prevent eligible employees from retiring on disability. The purpose of this reassignment requirement is to aid those employees with handicaps who want to continue employment with their agencies. The requirement to reassign only arises when an employee is unable to perform his or her position because of a handicap, i.e., in those situations when an agency is proposing to remove or downgrade an employee for inability to perform his or her job. If an employee is unable to perform his job and declines an offer made in compliance with this section, the agency has completely fulfilled its obligation under this section; the agency should not and cannot cite this section as authority for a non-consensual reassignment. We do not believe that this section conflicts with the rights of employees or the obligations of agencies under applicable disability retirement systems. The Office of Personnel Management did not raise any such objection in their comments on this section. On the contrary, EEOC patterned this section on the statutory and regulatory requirements applicable to the disability retirement provisions under the Civil Service Retirement System and the Federal Employees Retirement System.

The proposed section exempted the Postal Service from the requirement insofar as it might otherwise be required to reassign an employee to a position in a different craft or to make any other reassignment that would be inconsistent with the terms of a collective bargaining agreement covering an employee. This exemption for the Postal Service was included in order to be consistent with the reassignment requirements of the federal disability retirement schemes at 5 U.S.C. 8337 and 5 U.S.C. 8451. Some commenters questioned why a cross-craft reassignment should not be required if such a reassignment was consistent with applicable collective bargaining agreements. If such a reassignment is permitted by the applicable agreements and otherwise

consistent with this section, we agree that it should be required. Accordingly, we have revised the section to require reassignment in the Postal Service unless prohibited by applicable collective bargaining agreements. This exception recognizes the rights of Postal Service employees under their collective bargaining agreements, but the exception is limited to the Postal Service. Labor relations at the Postal Service are governed by the National Labor Relations Act, while most other federal agencies are governed by the federal service labor relations provisions of the Civil Service Reform Act. Unlike Postal Service employees who have legitimate expectations based on seniority, other federal employees do not have such expectations because, under the Civil Service Reform Act, federal agencies retain the right to hire and assign employees in accordance with applicable laws, 5 U.S.C. 7106, and are subject to government-wide regulations such as these, 5 U.S.C. 7117.

We would like to emphasize some of the basic provisions of this section that some of the commenters misunderstood. The duty to reassign an employee with handicaps only arises when the employee is no longer able to perform because of the handicap; an employee with handicaps can be discharged or disciplined without reassignment if the discharge is based upon conduct or performance that is not due to the handicap, if the conduct or performance is so egregious to warrant discharge even despite the presence of a handicap, or if the employee does not adhere to the terms of a rehabilitation agreement. The employee also must be able to perform another position with or without accommodation. The duty to provide an accommodation in the reassigned position is, of course, subject to the undue hardship limitation. Therefore, if the individual cannot perform any available position without an accommodation and any necessary accommodation would impose an undue hardship on the agency, the agency has no further obligation under this section. The Commission believes that the undue hardship concept should apply to the reassignment provision as it does to the reasonable accommodation provision.

#### *G. Opting Out of Class Complaints*

The Commission proposed to delete the opting out provisions contained in § 1613.605(b). The class complaint regulations were based on rule 23 of the Federal Rules of Civil Procedure. See 41 FR 8081 (1976); 42 FR 11807 (1977). Rule 23 governs class action lawsuits. Employment discrimination class



actions are generally brought under subsection (b)(2) of rule 23. *Homes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983). A prerequisite of a "(b)(2)" class is that the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). The right to opt out of such a class would be inconsistent with the prerequisite of a (b)(2) class that relief is appropriate for the class as a whole. Some courts have permitted class members to opt out of a (b)(2) class but only at the settlement or relief stage. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1548, 1554 (11th Cir. 1986). In *Cox*, the court held that it would be an abuse of discretion for a district court to permit a right to opt out at the certification stage, i.e., before the class is identified or before the merits of the class claim are considered or resolved.

Permitting class members to opt out would make the class action mechanism less effective. It would make possible the repeated litigation of pattern and practice issues, a consequence that the class action procedure was designed to prevent. *Cox*, 784 F.2d at 1554. Use of an opt out procedure at the commencement of a class action "force(s) class members to take a stand against their employers in order to stay in a controversial lawsuit." *Cox*, 784 F.2d at 1554-55. It also discourages settlement by making it impossible to resolve all claims at once and would subject the defendant to the risk that class members will settle only the questionable claims and opt for separate treatment of the stronger claims. *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981). An opt out provision is thus inconsistent with the Title VII goal of encouraging settlement of claims.

Even though the opt-out provision is eliminated from the regulation, all class members will still receive notice that the class complaint has been filed and notice of any settlement or decision on the class complaint. If they do not wish to participate in the class complaint. If they do not wish to participate in the class or to file a claim for individual relief, they do not have to do so. Those who wish to participate will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found. EEOC believes that class members' rights are sufficiently protected by the notice provisions and that the opt-out provision is both inconsistent and unnecessary.

The comments were unanimously in favor of this revision.

#### H. Negotiated Grievance Procedure.

Under 29 CFR 1613.219, employees of agencies covered by 5 U.S.C. 7121(d) must elect initially to pursue a matter that is both grievable and allegedly discriminatory either through the negotiated grievance procedure or through the EEO complaint process, but not both. This regulatory provision also states that allegations of discrimination by employees of agencies not subject to 5 U.S.C. 7121(d) will not be subject to an election and should be processed as complaints under part 1613. Part 1614 continues this processing distinction between agencies that are and are not covered by 5 U.S.C. 7121(d).

In view of the dual filing and processing responsibilities that can arise in agencies that are not covered by 5 U.S.C. 7121(d), however, EEOC proposed to toll the new 180-day processing limit for such complaints. One agency objected to the mandatory nature of the section and suggested that it may be in the parties' interests to process the complaint even though a grievance has been filed. One employee union objected that the employee in agencies not covered by 5 U.S.C. 7121(d) has a right to dual processing. EEOC believes that dual processing is, in most cases, wasteful and confusing and that temporarily holding the complaint in abeyance is an appropriate response to such a situation. If the employee is not satisfied with the result of the grievance process, the complaint can be pursued after the grievance procedure has terminated. We also recognize that there may be some individual circumstances where holding the complaint in abeyance would not be appropriate. Therefore, we have revised the section to permit rather than require agencies not subject to 5 U.S.C. 7121(d) to hold complaints in abeyance. Whenever an agency does so, it must notify the complainant. If the agency chooses not to hold the complaint in abeyance, the normal time limits are not tolled and the agency must issue a notice within 180 days.

#### I. ADEA Statute of Limitations.

The Commission proposed in § 1614.410 to address the absence of an explicit statute of limitations period in section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, which creates a right of action against federal agencies for violations of the ADEA. The proposed regulation addressed the situations when the complainant filed an administrative complaint and a notice of intent to sue. The absence of an express

limitations period in a statute does not mean that there is no time limitation for filing suits under that statute.

*DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). When a statute is silent, courts borrow a limitations period from a closely analogous statute. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975).

When an individual has not filed a notice of intent to sue but has pursued the complaint through the administrative process, the courts have split on the issue of the correct statute of limitations applicable to ADEA lawsuits by federal employees. One court found that two- and three-year limitations period for private sector ADEA cases was the most analogous limitations period for federal sector ADEA cases. *Weirsem v. Tennessee Valley Authority*, 41 Fair Empl. Prac. Cas. (BNA) 1588 (E.D. Tenn. 1986). But see *Lehman v. Nakshian*, 453 U.S. 156 (1981) (the Court held that the federal sector provisions of the ADEA are self-contained and looked to title VII rather than the private sector provisions of the ADEA for guidance in interpreting the ADEA's federal sector provisions). Other courts have borrowed the title VII limitations period as the most analogous. *Lavery v. Marsh*, 918 F.2d 1022 (1st Cir. 1990); *Matthews v. U.S. Postal Service*, 49 Fair Empl. Prac. Cas. (BNA) 311 (N.D.N.Y. 1989); *Carraway v. Postmaster General of the United States*, 678 F. Supp. 125 (D. Md. 1988); *Strazdos v. Baker*, 689 F. Supp. 310 (S.D.N.Y. 1988); *DiCamillo v. U.S. Postal Service*, No. 87-6028 (D. Conn. April 22, 1988); *Ramachandran v. U.S. Postal Service*, No. CV-86-7690 WDK (C.D. Cal. April 15, 1987). *aff'd*, No. 87-6028 (9th Cir. May 26, 1988); *Healy v. U.S. Postal Service*, 677 F. Supp. 1284 (E.D.N.Y. 1987); *White v. Department of the Air Force*, No. CA-3-87-1452-R (N.D. Tex. Oct. 14, 1987). See also *Rivera v. U.S. Postal Service*, 830 F.2d 1037, 1039 (9th Cir. 1987) (dismissing ADEA claims for failure to file within 30 days), cert. denied, 108 S. Ct. 1737 (1988). Three courts have refused to borrow the 30-day limitations period of title VII for ADEA actions without stating what limitations period should be borrowed. *Coleman v. Nolan*, 693 F. Supp. 1544 (S.D.N.Y. 1988); *Wetzel v. U.S. Postal Service*, No. 87-4-CIV-5 (E.D.N.C. Aug. 14, 1987); *Tkac v. Veterans Administration*, 610 F. Supp. 1075 (W.D. Mich. 1985). Two courts applied the six-year statute of limitations contained in 28 U.S.C. 2401(a) to a federal sector ADEA suit. *Lubniewski v. Lehman*, 891 F.2d 216 (9th Cir. 1989); *Marks v. Turnage*, 46 Fair Empl. Prac. Cas. (BNA)



382 (N.D. Ill. 1988). Another court, while not reaching the issue, discussed the issue and indicated its belief that the six-year limitations period should apply. *Bornholdt v. Brady*, 869 F.2d 57 (2d Cir. 1989).

We find the reasoning of the cases applying the two- or three-year limitations period of the private sector ADEA provisions or the six-year limitations period of 28 U.S.C. 2401(a) to be unpersuasive and believe that the use of those limitations periods would be inconsistent with the administrative process that Congress intended to be utilized for federal sector ADEA complaints. The most closely analogous statute to the federal sector provisions of the ADEA is section 717 of title VII. EEOC believes that the limitations period applicable to civil actions under title VII should be borrowed for federal sector ADEA lawsuits.

Although there are differences between the federal sector provisions of Title VII and the ADEA, courts have nevertheless looked to Title VII for analogous procedures to use in federal employees' ADEA lawsuits. *E.g.*, *Lehman v. Nakshain*, 453 U.S. 156 (1981) (as in title VII action, plaintiff is not entitled to trial by jury); *Ellis v. United States Postal Service*, 784 F.2d 835, 838 (7th Cir. 1986) (as in Title VII action, the only proper defendant in the ADEA suit is the head of the federal agency); *Smith v. Office of Personnel Management*, 778 F.2d 258, 262 (5th Cir. 1985) (like title VII, the ADEA does not allow recovery of compensatory damages). The use of different statutes of limitations for federal sector title VII and ADEA cases could lead to attempts to split complaints alleging that a single action violates both statutes or to premature departure from the administrative process in order to timely file a lawsuit on the ADEA issue.

Two of the Circuit Court decisions, *Bornholdt* and *Lubniewski*, reach the conclusion that the six-year limitations period should apply. These courts gave two rationales for their conclusions. First, they concluded that Congress chose not to make the limitations period for ADEA suits the same as that for title VII suits because the congressional committee considering the extension of the ADEA to federal employees deleted a 30-day limitations period from the bill without explanation. We do not believe that an unexplained omission should be construed as a specific rejection.

Secondly, these courts interpreted EEOC's ADEA regulations as being consistent with this conclusion because the regulations do not state that the limitations period for ADEA suits is 30 days and because the regulation

defining the limitations period for title VII suits is not incorporated by EEOC's ADEA regulations. We do not believe that such an inference necessarily flows from these regulations. Most importantly, the courts did not consider the effect of the CSRA or the anomalous results of their opinions, i.e., that one lawsuit resulting from one incident or event alleging violations of title VII and the ADEA would be governed by different limitations periods. In our opinion, these two courts reached erroneous conclusions and the subsequent decision in *Lavery v. Marsh*, 918 F.2d 1022 (1st Cir. 1990), convincingly rebuts and rejects the reasoning of *Lubniewski* and *Bornholdt*.

In *Lavery*, the court found title VII to be a natural source for borrowing a statute of limitations as "the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace \* \* \*." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Although there are minor differences between the federal sector provisions of each statute, the court was persuaded that they are essentially similar and that the many courts that have borrowed the 30-day limit from title VII were correct. The court was unwilling to ascribe deliberateness to Congress' omission of the 30-day limitations period in section 633a and concluded that the legislative history relied on the *Bornholdt* and *Lubniewski* courts was ambiguous and shed no light on congressional intent. The court also noted that borrowing the six-year period of 28 U.S.C. 2401(a) would be inappropriate since there are other relevant statutory provisions more specifically geared to the claim at issue. The court found that the 30-day limitations period in the CSRA provided further evidence that Congress did not intend to adopt the six-year provision. Finally, the court noted that a statute of limitation is a limited waiver of sovereign immunity and, without a clear manifestation from Congress that it intended such a radically longer limitations period (6 years), it refused to impute such an intent.

In section 114 of the Civil Rights Act of 1991, Public Law No. 102-166 (1991), Congress amended section 717 of title VII to increase the period of time for an individual to file suit in court from 30 days to 90 days after receipt of a final agency or Commission decision. That 90-day period will also apply to suits brought under sections 501 and 505(a) of the Rehabilitation Act. Section 115 of the Act amended section 7 of the ADEA to provide a similar 90-day suit period for employees of state and local governments and private sector employees who have filed a charge with

the Commission under the ADEA. These legislative amendments make those suit periods consistent with the 90-day suit period under section 706 of title VII and incorporated into the Americans with Disabilities Act. The Commission believes it is most appropriate to borrow this 90-day period in order for there to be a uniform limitations period for all claims of employment discrimination.

Further support for borrowing the title VII limitations period is found in the Civil Service Reform Act (CSRA) and its legislative history. The CSRA provides a 30-day limitations period for federal employee to file suit when a claim of age discrimination is based on an action that is appealable to the MSPB, i.e., a mixed case involving a claim of age discrimination. 5 U.S.C. 7703(b)(2). This may indicate that Congress intended or understood that the 30-day limitations period from title VII applied as well to ADEA lawsuits. See S. Rep. No. 969, 95th Cong., 2d Sess. 63, reprinted in 1978 U.S. Code Cong. & Admin. News 2723, 2785 ("Under the anti-discrimination laws an employee has 30 days from the final agency action to initiate a de novo court proceeding"). The CSRA also constitutes another analogous statute of limitations that is available for borrowing, but the Commission does not believe that its 30-day provision would be consistent with the 90-day limitations period applicable to title VII complaints. In addition, the period for private sector ADEA charges was changed by the Civil Rights Act to the same 90-day period. As a result, we believe 90 days to be the appropriate limitations period.

The agency and non-agency commenters agreed that borrowing the title VII limitations period was the best time period for suits based on administrative complaints although some doubted that EEOC had authority to establish a statute of limitations and recommended that we await legislative action. EEOC is not attempting to legislate a statute of limitations. At the present time there is no guidance for ADEA litigants and the case law is far from unanimous. As the agency charged with enforcing and administering the ADEA, it is entirely appropriate for EEOC to inform federal employees about their rights and to provide the best available information. Based upon established case law and the ADEA, EEOC believes that courts using the title VII period have made the more persuasive case and applied the statute of limitations that best serves the purposes of the ADEA. By proposing this regulation and coordinating it within the Executive Branch, the Commission has also achieved the advantage that the



public will know the consistent position of the Executive Branch. We believe that stating our opinion and analysis of this issue in the regulations is consistent with our responsibility and will prove helpful to litigants and to those courts who have not considered or who have occasion to reconsider the issue.

In proposed part 1614, EEOC proposed that the limitations period applicable to suits brought under title VII and the CSRA be borrowed and applied to suits brought under section 15 of the ADEA by individuals who have filed administrative complaints. Where, however, an individual files a notice of intent to sue, EEOC proposed that the two- or three-year limitations period applicable to private sector ADEA lawsuits be used, because the notice of intent to sue procedure clearly comes from the private sector ADEA process, and adopting that limitations period for this purpose is consistent with the case law on borrowing statutes of limitation.

Some commenters objected to our proposal of the two- or three-year statute of limitations for those persons who choose to file notice of intent to sue rather than file an administrative complaint. They argued that *Nakshian* precludes use of this limitations period, that it is too short and that we should await legislative action. In light of these comments, we have decided to eliminate any discussion in the regulation of the appropriate limitations period for bringing suit after giving notice of intent to file and merely caution potential plaintiffs to file as soon as possible after the expiration of the required waiting period.

#### J. Exhaustion of Remedies Under the ADEA

In § 1614.409(b), EEOC proposed to address the exhaustion of remedies problem raised by the decisions in *Purtill v. Harris*, 858 F.2d 134, 137 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983); *Bunch v. United States*, 548 F.2d 336, 340 (9th Cir. 1977), and other cases. These cases hold that once a federal complainant under the Age Discrimination in Employment Act initiates administrative procedures, he or she must exhaust these procedures before filing a civil action. As the agency responsible for interpretation and enforcement of the ADEA in the Federal sector, EEOC believes that a complainant exhausts administrative remedies either (1) 180 days after filing a complaint (the time period during which the agency is required to conduct a complete investigation) if the agency has not issued a decision, (2) after a final decision by the agency, (3) 180 days after filing an appeal with the EEOC, if

EEOC has not issued a decision, or (4) after EEOC issues a decision on an appeal. This exhaustion requirement is the same as the title VII exhaustion requirement and will permit those complainants alleging age discrimination as well as title VII discrimination to bring the entire complaint to court at the same time. All comments received on this issue agreed with the proposal.

#### K. Clear and Convincing Evidence Standard

Currently, 29 CFR 1613.271 states that full relief should be provided to an individual when discrimination is found unless the record contains clear and convincing evidence that the individual would not have been selected in the absence of discrimination. During the public comment and interagency coordination of the 1987 amendments to part 1613, published at 52 FR 41919 (1987), commenters suggested that the burden of proof be changed from "clear and convincing evidence" to "a preponderance of the evidence" standard. Subsequently, the Supreme Court issued its decision in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), in which it held that an employer can avoid liability, and hence any relief, in a mixed motive case upon showing by a preponderance of the evidence that the same determination would have been made even absent discrimination. Proposed § 1614.501 contained the same clear and convincing evidentiary standard as § 1613.271 but EEOC invited comment on whether the Supreme Court's decision required any change to that standard.

Some agency commenters argued that *Hopkins* required a change to preponderance of the evidence. Other agency commenters and most non-agency commenters believe that no change was necessary because *Hopkins* concerned proof at the liability stage while the regulation concerns proof at the relief stage and because the *Hopkins* decision itself cited and distinguished our regulation on this basis. We agree that the *Hopkins* decision does not require a change in the regulation. *Hopkins* relates solely to liability in mixed motive cases; it does not affect the standards of proof applicable to liability or relief in single motive cases. We recognize that the regulation will be applied most often to determining whether class members are entitled to individual relief after a class finding of discrimination, but it is also applicable to individual cases where there has been a finding of discrimination.

We also believe that *Hopkins* only applies to contemporaneous mixed

motive cases, i.e., those cases where both motives or reasons were actually known and actually affected the decision. If an agency proves by clear and convincing evidence that it had some legitimate reason for taking the action in question or not selecting the complainant but only discovered that reason after the actual decision was made, it would not escape liability. It may succeed, however, in limiting the amount of relief.

#### L. Interest

In the process of developing proposed part 1614, EEOC considered proposals to require payment of interest on back pay in discrimination cases and to provide for awards of attorney's fees in Age Discrimination in Employment Act cases. The Assistant Attorney General, Office of Legal Counsel, at the Department of Justice advised us, however, of his opinion that the Back Pay Act of 1966, 5 U.S.C. 5596, does not serve as a waiver of sovereign immunity for those purposes. Therefore, we provided in proposed § 1614.501 that interest on back pay may not be awarded to federal applicants or employees who prevail in discrimination claims. Proposed § 1614.501(e) remained unchanged from its counterpart in part 1613; that is, the attorney's fees awards provisions shall apply to allegations of discrimination or retaliation prohibited by title VII and the Rehabilitation Act.

Some commenters suggested that the Department of Justice's opinion is incorrect and that EEOC should award interest on back pay and attorney's fees on ADEA complaints. EEOC asked the Attorney General to reconsider the Assistant Attorney General's opinion. The Attorney General forwarded the Commission's request to the Assistant Attorney General who notified the EEOC that he was adhering to the conclusion of his earlier memorandum. We note that the Court of Appeals for the District of Columbia recently ruled against the Justice Department's position, finding that the Back Pay Act waived sovereign immunity for the award of interest on backpay in employment discrimination cases. *Brown v. U.S. Department of the Army*, 918 F.2d 214 (1990). A few commenters also noted that the proposal went too far when it stated that interest may never be paid on back pay awards under part 1614 since sovereign immunity has been waived for some agencies, e.g., the Postal Service. Further, section 114 of the Civil Rights Act of 1991, Public Law No. 102-166 (1991), amends section 717 of title VII to provide for the payment of interest on back pay. Consequently, the



regulation provides for payment of interest where sovereign immunity has been waived.

#### Section by Section Analysis

In addition to the structural changes and significant issues noted above, we considered comments seeking numerous changes to the proposed regulations and have adopted many of them. The public comments contained hundreds of comments of an editorial nature or of minimal general interest. We considered all comments and made many changes to the regulations based on those comments. We have not detailed every change or decision not to make a change in this analysis. We list below, on a section by section basis, those comments and changes that require explanation or are of general public interest.

#### Section 102(b)(3)

Some agencies believed that they were restricted in appointing Special Emphasis Program Managers to those listed in the regulation. The Office of Personnel Management commented on the provision and suggested that it be changed to provide designation of such program managers as may be required by OPM or the particular agency. We changed the provision to make clear that agencies are permitted to appoint Special Emphasis Program Managers as may be necessary, in addition to those listed as examples in the regulation.

Other commenters objected to the provision in the regulation that the EEO Director be under the immediate supervision of the head of the agency. That provision has been in the federal sector regulations since 1972. Moreover, section 1614.607 permits that individual to delegate that authority. Ultimate responsibility would remain, though, with the higher official.

#### Section 103(a)

In editing the final rule, we state in this section that complaints alleging retaliation prohibited by title VII, the ADEA, the Rehabilitation Act and the Equal Pay Act are considered to be complaints of discrimination for purposes of this part. (As indicated in § 1614.101(b), a complaint of retaliation can be predicated on opposing practices made unlawful by these statutes as well as participating in administrative or judicial proceedings under those statutes.) The change is purely editorial in nature and does not affect the coverage of retaliation as a prohibited practice under the statutes and the regulations. Whenever any regulation in this part speaks of a complaint of discrimination, the reference should also

be read to include a complaint of retaliation.

#### Section 103(b)(4)

An agency requested that we define "unit of the legislative and judicial branches" for purposes of coverage under this part, and recommended that only competitive service positions in these units be covered. We have concluded that the question is best left for case by case analysis and decision and, therefore, decline to include a definition in the regulation.

#### Section 103(c) and (d)

The Commission has reviewed its proposed regulation in light of *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S.Ct. 1227 (1991). The Commission believes, as did the Civil Service Commission, that the statutes prohibiting discrimination in federal employment, insofar as they are unaffected by treaty obligations, apply to federal employees overseas. The legislative history of the statutes clearly envisions coverage of overseas employees, and there is no possibility of conflict with foreign laws. This conclusion is bolstered by Congress' specific coverage of overseas employment in section 109 of the 1991 Civil Rights Act.

In response to a comment received during the public comment period, the Commission included an explicit exemption from this Part for uniformed members of the military departments listed in 5 U.S.C. 102. The exclusion is consistent with *Johnson v. Hoffman*, 424 F. Supp. 490 (E.D. Mo. 1977), *aff'd sub nom.*, *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978).

#### Section 105(b)

A commenter suggested that we provide that the written notice of rights and responsibilities required by this section may be sent to the aggrieved person immediately following the initial counseling session if the counseling session took place over the telephone. The section requires counselors to advise individuals in writing of their rights and responsibilities at the initial counseling session. We agree with the comment and intend the section, as written, to cover providing the notice immediately following the counseling session in those circumstances.

#### Section 105(e)

We received a number of comments on the provision for extending the counseling session for an additional period of no more than 60 days, upon agreement between the aggrieved

person and the counselor. Several commenters requested that the section be changed to allow for extensions with the approval of the EEO Director; another commenter asked if the agency must agree if the complainant requests an extension. We are clarifying the section by replacing "counselor" with "agency." The section now requires that both the complainant and the agency (through the EEO Office, not the counselor) must agree to an extension.

#### Section 105(f)

An agency inquired whether the provision for an extension applied only to a department- or agency-wide alternative dispute resolution (ADR) process, or included local ADR procedures. The regulation is written broadly to cover any ADR procedure, whether it is local or agency-wide.

#### Section 107

We have changed the title of this section from "Rejections or Cancellations of Complaints" to "Dismissals of Complaints." The change simplifies the section.

#### Section 107(a)

This section provides for dismissal of complaints for failure to state a claim or stating a claim that is pending before or has been decided by the agency or EEOC. In response to a comment regarding class complaints and this section, we note that if an agency accepts an administrative judge's recommendation to accept a class complaint, individual complaints concerning the class allegations filed before or after acceptance of the class complaint by class members are subsumed into the class complaint, and should not be dismissed. The Commission believes such a provision is necessary to preserve individual rights when the class complaint is dismissed without a determination binding the individual.

#### Section 107(b)

In response to a comment, we have added the clause "and is not like or related to the matter(s) brought to the attention of a Counselor" to clarify dismissal of complaints or issues that have not been raised with a Counselor. The Commission agrees with the line of cases following the holding in *Sanchez v. Standard Brands*, 431 F.2d 455 (5th Cir. 1970), that bases of discrimination (e.g., race, sex, age, handicap) can be changed or added during the complaint process. We have added a provision for remanding like or related issues for counseling and other appropriate action



when such an issue is raised at a later time. The agency retains the authority to dismiss any such issue for the reasons delineated in this section.

#### Section 107(e)

We have rewritten this section providing for dismissals of complaints that allege discrimination as to proposed personnel actions to include dismissals of allegations of proposals to take personnel actions or any preliminary steps to a personnel action. We intend the section to require dismissal of complaints that allege discrimination in any preliminary steps that do not, without further action, affect the person; for example, progress reviews or improvement periods that are not a part of any official file on the employee. If the individual alleges, however, that the preliminary step was taken for the purpose of harassing the individual for a prohibited reason, the complaint cannot be dismissed under this section because it has already affected the employee.

One agency suggested that mootness be explicitly added to the regulation. We have adopted that suggestion and included the explicit provision in this subsection. While mootness could also be classified under failure to state a claim, it is added to this subsection to permit it to be raised throughout the complaint process, since mootness can occur throughout the process.

#### Section 107(g)

We have clarified the intent of this section. It provided that an agency could dismiss for failure to cooperate when the complainant failed to "satisfy" a written request to provide information or to proceed. We understand that some complaints have been dismissed because agencies believed that a complainant did not fully satisfy a given request. This result was never intended. The provision has now been modified to state that a dismissal is only appropriate on this basis when the complainant fails to respond to such a written request or his or her response does not address the agency's request.

#### Section 107(h)

One agency requested that delegation of authority under this section for certification of offers of full relief be expanded. The section only allows certification to designees reporting directly to the EEO Director or the Chief Legal Officer. We purposely do not provide for further delegation of authority for certification of offers of full relief because we anticipate that agencies will use the procedure infrequently and we do not believe that delegation below the level for which the

regulation provides is necessary or advisable.

We also want to clarify how the dismissal for failure to accept full relief operates. If an agency makes a certified offer of full relief and the complainant rejects it, the agency shall dismiss the complaint. The individual can appeal this dismissal to EEOC. If EEOC finds that the relief offered by the agency was not full relief, EEOC will issue an appellate decision reversing the dismissal. The decision will remand the complaint to the agency to be processed further in accordance with the normal procedures unless a revised offer of full relief complying with EEOC's determination is made within a stated period of time. If EEOC finds that the relief offered by the agency was full relief, it will affirm the agency's dismissal of the complaint and the complainant can file a civil action for a determination of his or her rights. If EEOC affirms the agency's dismissal, the agency has the authority to re-offer the relief but it is not required to do so.

We have lengthened the time provided in the section for complainants to consider certified offers of full relief from 15 days to 30 days to enable complainants to seek legal advice on the sufficiency of the offer of full relief. As discussed in the EEOC Management Directive, with each offer of full relief the agency must attach a copy of the EEOC pamphlet describing the remedies that may be available to the individual. Further information appears in the EEOC Management Directive.

Many commenters expressed concern generally with the provisions in Subpart A that referenced management directive instructions. We have retained those provisions. We would like to clarify that the management directive will not contain instructions regarding internal structure of agency EEO programs and personnel. We do not believe it is appropriate to include the management directive instructions in the regulation itself. Consistent with statute and Executive order, the Commission issues regulations, and instructions in management directives. It would not serve the purpose of these regulations to include the interpretations and instructions of management directives in the regulations. Management directives will contain instructions and guidance that is nonregulatory in nature.

#### Section 108

The investigative provisions combine some of the provisions of §§ 1614.106 and 1614.405 of the proposed rule.

#### Section 108(e)

One of the intelligence agencies requested a provision for a unilateral extension of the 180 day agency processing time of 45 days to allow for sanitization of the files. We have added a sentence in the section providing that intelligence agencies may unilaterally extend for up to 30 days to sanitize a file, provided they notify the complainant of the extension.

#### Section 108(e) and (f)

A number of agencies asked for clarification regarding processing of complaints where some, but not all, issues are accepted for investigation. In part 1613, complaints are split between rejected issues and issues accepted for investigation. Complainants may appeal the rejected issues independently of the rest of the complaint. Part 1614 will operate similarly, but will not provide for splitting of complaints. Under part 1614 agencies will notify complainants of the issues that are accepted and those that are dismissed. If the complainant wishes to pursue any of the dismissed issues, the complainant would have to appeal the dismissal within 30 days of receipt of the dismissal. When an appeal is filed, the time limit for processing the remainder of the complaint will be suspended until a final Commission decision is issued.

#### Section 109

The hearing provisions are taken substantially from § 1614.406 of the proposed regulation.

#### Section 109(e)

This provision was formerly in proposed section 1614.406(c). One commenter suggested that the provision for statements setting forth material facts believed not to be in genuine dispute in this section should include a requirement that they be filed at least 15 days before the hearing. The administrative judge can set time limits for submission of statements, as well as for discovery, as part of his or her control over the hearing process. We decline, therefore, to provide time limits in the regulation.

#### Section 109(f)

One agency and several other commenters suggested that the hearing section in proposed § 1614.406(d) contain a provision requiring transcripts of hearings. We have added this section to provide, as in part 1613, for transcripts of hearings, to be arranged for and paid for by the agencies. Agencies currently budget for and receive appropriations for transcripts,



while EEOC does not. The requirement that agencies continue to do so under part 1614 is consistent with current practice.

#### *Section 201(c)*

We moved this section covering exhaustion of Administrative remedies under the Age Discrimination in Employment Act from proposed § 1614.410 to 201(c). The proposed rule contained two separate sections on civil action rights, one for the ADEA (§ 1614.410) and one for title VII and the Rehabilitation Act (§ 1614.409). We have consolidated the two sections to simplify the regulation and make it clear that the civil action rights under the three statutes are the same. Consequently, we moved the ADEA exhaustion of administrative remedies section to § 1614.201. We did not make any changes to the substance of the section.

#### *Section 202*

Several agencies commented on our inclusion of Equal Pay Act complaints in part 1614. Part 1613 did not cover Equal Pay Act complaints, but they were processed by EEOC district offices in accordance with a management directive. Equal Pay Act complaints against all federal agencies, including the Postal Service, the Tennessee Valley Authority and the Postal Rate Commission, will now be processed in accordance with part 1614 in the same manner as all other federal sector complaints covered by this part. We believe inclusion of Equal Pay Act complaints in this part is warranted because any Equal Pay Act complaint is also a title VII sex discrimination complaint.

#### *Section 203(a)(6)*

One commenter requested that the definition of qualified individual with handicaps include a requirement for meeting policy-based criteria as well as experience and education criteria. We did not change the regulation because we believe that the requirement that an applicant or employee be able to perform the essential functions of the position in question includes meeting legitimate policy-based criteria. The phrase "essential functions" includes agency-established norms of personal demeanor and conduct in addition to job performance standards.

#### *Section 203(d)*

In response to comments, we have made two changes to this section prohibiting the use of employment tests or other selection criteria that tend to screen out qualified individuals with

handicaps. We included the phrase "or other examining authority" in section 203(d)(1)(ii) for those agencies that are not under OPM authority. Consistent with this change, we added a provision in the same subparagraph to make clear that OPM must show that no alternative tests are available for those tests it develops and that other agencies must make that showing for tests they have authority to develop. One commenter asked whether a limited appointment is a test. This section applies to tests or other selection criteria and limited appointments are not selection criteria. As a result, limited appointments are not covered by this provision.

#### *Section 204*

As we noted under section 107(a), if an agency accepts an administrative judge's recommendation to accept a class complaint, individual complaints concerning the class allegations filed by class members before or after acceptance of the class complaint are subsumed within the class complaint, and should not be dismissed.

#### *Section 203(h)*

A new subsection (h) has been added to incorporate the amendments to the Rehabilitation Act made by section 512 of the Americans with Disabilities Act. That provision excludes current users of illegal drugs from the definition of the term individual with handicap(s). The Commission intends this subsection to be interpreted in a manner consistent with § 1630.3(a)-(c) of the Commission's regulations implementing title I of the Americans with Disabilities Act, 29 CFR 1630.3(a)-(c), with the corresponding sections of the Interpretive Guidance accompanying those regulations, and with this section.

#### *Section 204(d)(3)*

When an allegation contained in a class complaint was not raised in counseling, but the failure to raise it is satisfactorily explained under this section, the allegation will be referred to a counselor and then will be consolidated with the original class complaint.

#### *Section 204(k)(3)*

The 45-day time limit in this section defining the period for which class-wide discrimination can be found is not intended to limit the two-year time period for which back pay can be recovered by a class member.

#### *Section 301*

This section provides that election between the negotiated grievance process and the EEO complaint process

occurs upon filing of a written complaint. Election does not occur when an aggrieved person contacts a counselor because counseling provides the person with information that allows him or her to decide which process to elect.

#### *Section 301(b)*

In response to a request for clarification, this section applies both to complainants who are covered by collective bargaining agreements that do not permit allegations of discrimination to be raised in the negotiated grievance procedure and complainants who are not covered by collective bargaining agreements. In other words, the election provision of section 301(a) applies when 5 U.S.C. 7121(d) applies and when the complainant is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in the negotiated grievance procedure.

#### *Section 302(b)*

This section provides for election between filing a mixed case appeal with MSPB or a mixed case complaint in the EEO process. A commenter requested that agencies be required to inform employees of the right to elect among three processes, an MSPB appeal, the section 7121(d) grievance procedure or an EEO complaint. Counselors must inform employees of the three options and the election requirements. We added clarification at the end of the section for those instances in which a person files a mixed case appeal with MSPB and MSPB dismisses the appeal as nonjurisdictional. If the individual filed the mixed case appeal instead of a mixed case complaint, agencies are required to inform the individual that he or she may contact a counselor within 45 days and that the filing of the mixed case appeal will be deemed to be the date the individual initially contacted the counselor. If the individual filed the appeal with MSPB from an agency's final decision on the mixed case complaint without a hearing, the agency shall issue the notice required by § 1614.108(f) and give the individual the choice between a hearing and an immediate decision.

#### *Section 305(a)*

An agency noted that the 15-day filing deadline for oppositions to petitions to EEOC from MSPB decisions on mixed case appeals in this section runs from the date of service of the petition while most other such deadlines run from receipt. We have left the date of service provision unchanged because the statute



requires that the Commission determine within 30 days whether to consider the MSPB decision. 5 U.S.C. 7702(b)(2).

#### Section 402

The time limits for filing appeals has been clarified by adding a new subsection indicating when the time limits begin to run. Consistent with the recent decision in *Irwin v. Veterans Administration*, 111 S.Ct. 453 (1990), where a complainant is represented by an attorney of record, the time for appeal begins to run from the day when the attorney receives the final decision. Where the complainant is not represented by an attorney, the time period for appeal begins to run from the day that the complainant receives the final decision. Section 1614.605 has been revised to be consistent with this provision.

#### Section 403(a)

Commenters expressed concern regarding the provision in this section for filing a supporting statement or brief with the notice of appeal. We have revised the regulation to provide in section 403(d) that any supporting statement or brief must be filed within 30 days of the date the appeal was filed. This section does not require that a supporting statement or brief be filed, it merely provides an opportunity for such a filing. If no supporting statement or brief is filed, then OFO will decide the case based on the existing records.

#### Section 403(b)

This section contains a requirement that complainants serve the agency with the appeal and supporting statement or brief when they file it with the EEOC. We note that failure to serve the agency will not result in automatic dismissal of the appeal.

#### Section 403(d)

The agency's requirement to submit the complaint file and any statement of position it chooses to submit has been modified to provide that the submission will occur after receipt of a request for the file by the Office of Federal Operations. With the modification, the agency will be able to refer to the appeal number assigned to the appeal.

#### Section 404

A commenter suggested that if a record is found to be inadequate in a grievance, it should be remanded to the agency. While EEOC believes that the supplementation or remand provision will be used infrequently, either may be used when a discrimination issue in a negotiated grievance is appealed to EEOC.

#### Section 405(b)

OFO employs the "de novo" standard of review when issuing decisions on appeals. A credibility determination of an administrative judge that is based on the demeanor or tone of voice of the witness, however, will be accepted by OFO unless OFO finds that the determination was clearly erroneous, e.g., where documents or other objective evidence contradicts the witness' story or the story itself is so internally inconsistent or implausible that a reasonable factfinder would not credit it. See *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

#### Section 406

We have placed this section in reserve and titled it "Time Limits." Many commenters noted that the Commission had not placed time limits on itself in the appeal section and expressed concern that the absence of such limits was inequitable and could result in delays at the EEOC. Because we have changed the appellate process from the proposed part 1614, we do not propose an appellate time limit at this time. The section will remain reserved, though, in case it is necessary to impose a time limit in the future.

#### Section 407

In editing the final rule, we have removed the term reopen from this section and renamed the section "Reconsideration." The change is purely editorial in nature; we determined that reconsideration naturally includes reopening and that use of both terms is unnecessary. The Commission has not changed the procedure in the section, but has simplified its appellation.

#### Subpart E

We have similarly editorialized subpart E, changing the titles of the subpart and of its sections. We received some comments requesting clarification of the terms remedial action and corrective action, among other things. The changes are not substantive, but merely editorial in nature and are intended to simplify and clarify the terms used in the subpart. Subpart E is renamed Remedies and Enforcement. Its sections are renamed Remedies and Relief, Compliance with Final Commission Decisions, Enforcement of Final Commission Decisions and Compliance with Settlement Agreements and Final Decisions. Section 1614.504 in the proposed part 1614 has been included in its entirety in § 1614.503.

#### Section 501(b)

We deleted the second reference to the clear and convincing standard in the middle of the section because it is redundant. The first reference to the standard in the section applies also to the back pay provision. We also changed the word "made" to "declined" in the last paragraph of section 501(b)(1) in order to make the section internally consistent. As correctly stated elsewhere in section 501, an agency's back pay liability is cut-off when an unconditional offer of reinstatement is declined, not when it is made. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 238-39 (1982).

#### Section 501(c)(1)

An agency requested that in this section, which covers relief involving an employee, the Commission address the situation where an employee voluntarily leaves the agency before a discrimination finding is made. We have considered the question and concluded that it cannot be addressed in the regulation. There are some instances in which an employee's voluntarily leaving the agency would cut off the nondiscriminatory placement obligation and further back pay liability, but that would not hold true for all cases. We have replaced the term "retroactive promotion" with "nondiscriminatory placement" to more faithfully adhere to the Commission's remedies policy and to § 1614.501(a).

#### Section 501(d)

Several agencies raised objections to the requirement that agencies carry the burden of proving failure to mitigate. Case law places the failure to mitigate burden upon employers. E.g., *Sellers v. Delgado Community College*, 839 F.2d 1132, 1139 (5th Cir. 1988); *Edwards v. School Bd., City of Norton, Va.*, 659 F.2d 951, 959 (4th Cir. 1981); *U.S. v. Lee Way Motor Freight, Inc.*, 20 Fair Empl. Prac. Cas. (BNA) 1345, 1358 (10th Cir. 1979); *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975). Moreover, evidence of failure to mitigate is easily obtained during the agency investigation or during discovery associated with the hearing.

#### Section 502(b)

Two commenters stated that the requirement of temporary or conditional restoration in the event of a request for reconsideration is unprecedented, would be extremely disruptive and exceeds EEOC's authority. The requirement is currently found in § 1613.237 and the EEOC has decided to retain it for reasons of equity.



### Section 606

We received a number of comments asking how the timeframes of subpart A will work when complaints are consolidated under this section. We have added a sentence stating that the date of the first filed complaint controls the applicable timeframe.

### Section 607

We have removed proposed § 1614.607 governing severance of issues because part 1614 does not provide for it. Section 1614.607 now covers delegation of authority. Many agencies objected to the proposed delegation section and requested a broader delegation of authority. We have changed the delegation of authority section to mirror the current practice under part 1613, providing delegation from the agency head to one or more designees.

EEOC believes that this new complaint process will provide more efficient resolution of federal sector employment discrimination complaints while, at the same time, ensuring administrative fairness.

Complaints filed under 29 CFR part 1613 will be processed under the procedures of this part, except that for purposes of computing time, references in the regulations to performing certain actions from the date of filing the complaint shall be interpreted to mean from the effective date of these regulations. The Commission encourages agencies to use the period prior to October 1, 1992, to complete processing on all pending complaints, especially including those complaints filed prior to January 1, 1992. In addition, the provision in § 1614.108 requiring that investigations be completed within 180 days from the filing of the complaint shall require agencies to complete investigations of complaints filed under part 1613 within one year of the effective date of these regulations. If, in any complaint filed under part 1613, the complainant has requested a decision without a hearing or has not notified the agency whether a hearing is requested within the applicable time limit, the agency will treat those actions as requests for an immediate decision from the agency and, in accordance with § 1614.110, the agency shall issue a final decision within 120 days of the effective date of these regulations. The time period for investigating and issuing final decisions on complaints filed under part 1613 is longer than for those filed under part 1614 to permit agencies to eliminate any inventory of such complaints that may exist while at the same time implementing these new regulations.

These regulations have been coordinated with affected federal agencies pursuant to Exec. Order No. 12067 and have been reviewed by the Office of Management and Budget pursuant to Exec. Order No. 12291. The Commission hereby publishes its final rule.

### List of Subjects in 29 CFR Part 1614

Equal employment opportunity.  
Government employees.

For the Commission,

Evan J. Kemp, Jr.,  
Chairman.

For the reasons set forth in the preamble, title 29, chapter XIV of the Code of Federal Regulations is amended by adding part 1614 to read as follows:

## PART 1614—FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

### Subpart A—Agency Program To Promote Equal Employment Opportunity

- 1614.101 General policy.
- 1614.102 Agency program.
- 1614.103 Complaints of discrimination covered by this part.
- 1614.104 Agency processing.
- 1614.105 Pre-complaint processing.
- 1614.106 Individual complaints.
- 1614.107 Dismissals of complaints.
- 1614.108 Investigation of complaints.
- 1614.109 Hearings.
- 1614.110 Final decisions.

### Subpart B—Provisions Applicable to Particular Complaints

- 1614.201 Age Discrimination in Employment Act.
- 1614.202 Equal Pay Act.
- 1614.203 Rehabilitation Act.
- 1614.204 Class complaints.

### Subpart C—Related Processes

- 1614.301 Relationship to negotiated grievance procedure.
- 1614.302 Mixed case complaints.
- 1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.
- 1614.304 Contents of petition.
- 1614.305 Consideration procedures.
- 1614.306 Referral of case to Special Panel.
- 1614.307 Organization of Special Panel.
- 1614.308 Practices and procedures of the Special Panel.
- 1614.309 Enforcement of Special Panel decision.
- 1614.310 Right to file a civil action.

### Subpart D—Appeals and Civil Actions

- 1614.401 Appeals to the Commission.
- 1614.402 Time for appeals to the Commission.
- 1614.403 How to appeal.
- 1614.404 Appellate procedure.
- 1614.405 Decisions on appeals.
- 1614.406 Time limits. [Reserved]
- 1614.407 Reconsideration.
- 1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

- 1614.409 Civil action: Equal Pay Act.
- 1614.410 Effect of filing a civil action.

### Subpart E—Remedies and Enforcement

- 1614.501 Remedies and relief.
- 1614.502 Compliance with final Commission decisions.
- 1614.503 Enforcement of final Commission decisions.
- 1614.504 Compliance with settlement agreements and final decisions.

### Subpart F—Matters of General Applicability

- 1614.601 EEO group statistics.
- 1614.602 Reports to the Commission.
- 1614.603 Voluntary settlement attempts.
- 1614.604 Filing and computation of time.
- 1614.605 Representation and official time.
- 1614.606 Joint processing and consolidation of complaints.
- 1614.607 Delegation of authority.

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p.218; E.O. 11222, 3 CFR, 1964-1965 Comp., p.306; E.O. 11478, 3 CFR, 1969 Comp., p.133; E.O. 12106, 3 CFR, 1978 Comp., p.263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p.321.

### Subpart A—Agency Program To Promote Equal Employment Opportunity

#### § 1614.101 General policy.

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 *et seq.*), the Equal Pay Act (29 U.S.C. 206(d)) or the Rehabilitation Act (29 U.S.C. 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those statutes.

#### § 1614.102 Agency program.

(a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the



instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

(4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age or handicap, and solicit their recruitment assistance on a continuing basis;

(5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;

(6) Take appropriate disciplinary action against employees who engage in discriminatory practices;

(7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;

(8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;

(9) Reassign, in accordance with § 1614.203(g), nonprobationary employees who develop physical or mental limitations that prevent them from performing the essential functions of their positions even with reasonable accommodation;

(10) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;

(11) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;

(12) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;

(13) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and

(14) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

(b) In order to implement its program, each agency shall:

(1) Develop the plans, procedures and regulations necessary to carry out its program;

(2) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;

(3) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;

(4) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;

(5) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and

(6) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

(c) Under each agency program, the EEO Director shall be responsible for:

(1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;

(2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part.

(d) Directives, instructions, forms and other Commission materials referenced in this part may be obtained in accordance with the provisions of 29 CFR 1610.7 of this chapter.

#### § 1614.103 Complaints of discrimination covered by this part.

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

(1) Military departments as defined in 5 U.S.C. 102;

(2) Executive agencies as defined in 5 U.S.C. 105;

(3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; and

(4) All units of the legislative and judicial branches of the Federal Government having positions in the



competitive service, except for complaints under the Rehabilitation Act.

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

(d) This part does not apply to:

(1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section;

(2) Employees of the General Accounting Office;

(3) Employees of the Library of Congress;

(4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or

(5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. 213(f).

#### § 1614.104 Agency processing.

(a) Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§ 1614.105 through 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives.

(b) The Commission shall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their rights.

#### § 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in

paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in

writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

#### § 1614.106 Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105 (d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgement shall also advise the complainant that:



(1) the complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend the period.

#### **§ 1614.107 Dismissals of complaints.**

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

#### **§ 1614.108 Investigation of complaints.**

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

#### **§ 1614.109 Hearings.**

(a) When a complainant requests a hearing, the agency shall request that the Commission appoint an administrative judge to conduct a



hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with § 1614.105 for such other processing as ordered by the administrative judge.

(b) *Discovery.* The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(c) *Conduct of hearing.* Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing

complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(d) The procedures in paragraphs (d) (1) through (3) of this section apply to hearings of complaints:

(1) The complainant, an agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(e) *Findings and conclusions without hearing.* (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party

cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and conclusions without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

(f) *Record of hearing.* The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(g) *Findings and conclusions.* Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing findings of fact and conclusions of law, within 180 days of a request for a hearing being received by EEOC, an administrative judge shall issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the findings and conclusions to the parties by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the agency may reject or modify the findings and conclusions or the relief ordered by the administrative judge and issue a final decision in accordance with § 1614.110. If an agency does not, within 60 days of receipt, reject or modify the findings and conclusions of the administrative judge, then the findings and conclusions of the administrative judge and the relief ordered shall become the final decision of the agency and the agency shall notify the complainant of the final decision in accordance with § 1614.110.



**§ 1614.110 Final decisions.**

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

**Subpart B—Provisions Applicable to Particular Complaints****§ 1614.201 Age Discrimination in Employment Act.**

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal Sector Programs, 1801 L St., NW., Washington, DC 20507 within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not issued a final decision and the individual has not filed an appeal or 180 days after the filing of a class complaint

if the agency has not issued a final decision;

(2) After the issuance of a final decision on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

**§ 1614.202 Equal Pay Act.**

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The Commission will provide notice to the agency that it will be initiating an investigation.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part.

**§ 1614.203 Rehabilitation Act.**

(a) *Definitions.* (1) *Individual with handicap(s)* is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

(2) *Physical or mental impairment* means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) *Major life activities* means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) *Has a record of such an impairment* means has a history of, or has been classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) *Is regarded as having such an impairment* means has a physical or mental impairment that does not substantially limit major life activities

but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

(6) *Qualified individual with handicaps* means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets the experience or education requirements (which may include passing a written test) of the position in question; or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) *Reasonable accommodation.* (1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with handicaps; and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of



employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

(d) *Employment criteria.* (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity; and

(ii) OPM or other examining authority shows that job-related alternative tests, or the agency shows that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

(2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(e) *Preemployment inquiries.* (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty,

provided that: all entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for individuals with handicaps.

(3) To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if:

(i) The agency states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action; and

(ii) The agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that an applicant is eligible under special appointing authority for the disabled;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with handicaps shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(f) *Physical access to buildings.* (1) An agency shall not discriminate against

applicants or employees who are qualified individuals with handicaps due to the inaccessibility of its facility.

(2) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.) and the Americans with Disabilities Act of 1990 (42 U.S.C. 12183 and 12204).

(g) *Reassignment.* When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451. If the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position. For the purpose of this paragraph, an employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any applicable collective bargaining agreement.

(h) *Exclusion from definition of "individual(s) with handicap(s)".* (1) The term "individual with handicap(s)" shall not include an individual who is currently engaging in the illegal use of drugs, when an agency acts on the basis of such use. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812). The term "illegal use of drugs"



means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of federal law. This exclusion, however, does not exclude an individual with handicaps who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(2) Except that it shall not violate this section for an agency to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (h)(1) (i) and (ii) of this section is no longer engaging in the illegal use of drugs.

#### § 1614.204 Class complaints.

(a) *Definitions.* (1) A class is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or handicap.

(2) A class complaint is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An agent of the class is a class member who acts for the class during the processing of the class complaint.

(b) *Pre-complaint processing.* An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105.

(c) *Filing and presentation of a class complaint.* (1) A class complaint must be

signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance or dismissal.* (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall be any of the individuals referenced in § 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

(2) The administrative judge may recommend that the agency dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2).

(3) If the allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall recommend that the agency dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the agency for further counseling of the agent. After counseling, the allegation shall be consolidated with the class complaint.

(4) If an allegation lacks specificity and detail, the administrative judge shall afford the agent 15 days to provide specific and detailed information. The administrative judge shall recommend that the agency dismiss the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The administrative judge shall recommend that the agency extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit extension provisions contained in §§ 1614.105(a)(2) and 1614.604.

(6) When appropriate, the administrative judge may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The administrative judge's written recommendation to the agency on whether to accept or dismiss a complaint and the complaint file shall be transmitted to the agency and notification of that transmittal shall be sent to the agent. The administrative judge's recommendation to accept or dismiss shall become the agency decision unless the agency accepts, rejects or modifies the recommended decision within 30 days of the receipt of the recommended decision and complaint file. The agency shall notify the agent by certified mail, return receipt requested, and the administrative judge of its decision to accept or dismiss a complaint. At the same time, the agency shall forward to the agent copies of the administrative judge's recommendation and the complaint file. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and include EEOC Form 573, Notice Of Appeal/Petition.

(e) *Notification.* (1) Within 15 days of accepting a class complaint, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

(i) The name of the agency or organizational segment, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint;

(iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and

(iv) The name, address and telephone number of the class representative.



(f) *Obtaining evidence concerning the complaint.* (1) The administrative judge notify the agent and the agency representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the administrative judge for documents, records, comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, caused the administrative judge:

(i) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To recommend that a decision be entered in favor of the opposing party; or

(v) To take such other actions as the administrative judge deems appropriate.

(3) During the period for development of evidence, the administrative judge may, in his or her discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by an agency certified by the Commission.

(4) Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) *Opportunity for resolution of the complaint.* (1) The administrative judge shall furnish the agent and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for

the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the agency and the agent at any time as long as the agreement is fair and reasonable.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the relief, if any, to be granted by the agency. A resolution shall bind all members of the class. Within 30 days of the date of the notice of resolution, any member of the class may petition the EEO Director to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. Such a petition will be processed in accordance with § 1614.204(d) and if the administrative judge finds that the resolution is not fair and reasonable, he or she shall recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. An agency's decision that the resolution is not fair and reasonable vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the former class agent or the petitioner of the right to appeal the decision to the Office of Federal Operations and include EEOC Form 573, Notice of Appeal/Petition.

(h) *Hearing.* On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with 29 CFR 1614.109 (a) through (f).

(i) *Report of findings and recommendations.* (1) The administrative judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.

(2) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The administrative judge shall notify the agency of the date on which the report of findings and recommendations was forwarded to the agency.

(j) *Agency decision.* (1) Within 60 days of receipt of the report of findings and recommendations issued under § 1614.204(i), the agency shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.

(2) The final decision of the agency shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.

(3) When the agency's final decision is to reject or modify the findings and recommendations of the administrative judge, the decision shall contain specific reasons for the agency's action.

(4) If the agency has not issued a final decision with 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The agency shall transmit the final decision to the agent within five days of the expiration of the 60-day period.

(5) The final decision of the agency shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.

(6) A final decision on a class complaint shall, subject to subpart D of this part, be binding on all members of the class and the agency.

(7) The final decision shall inform the agency of the right to appeal or to file a civil action in accordance with subpart D of this part and of the applicable time limits.

(k) *Notification of decision.* The agency shall notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of its final decision to the agent.

(l) *Relief for individual class members.* (1) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the agent in accordance with § 1614.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination,



§ 1614.501 shall apply. The agency shall also, within 60 days of the issuance of the final decision finding no class-wide discrimination, issue the acknowledgement of receipt of an individual complaint as required by § 1614.106(d) and process in accordance with the provisions of subpart A of this part, each individual complaint that was subsumed into the class complaint.

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its final decision. The period of time for which the agency finds class-wide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminates the policy or practice found to be discriminatory in the final agency decision. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D of this part and the applicable time limits.

### Subpart C—Related Processes

#### § 1614.301 Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is

indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C. 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

#### § 1614.302 Mixed case complaints.

(a) *Definitions*—(1) *Mixed case complaint*. A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals*. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis

of race, color, religion, sex, national origin, handicap or age.

(b) *Election*. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal*. (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(d) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable



to the Commission except where it is alleged that § 1614.107(d) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(d), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(a) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 20 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within

20 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

#### § 1614.303 Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.

(a) *Who may file.* Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint under 5 CFR part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision. The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) *Method of filing.* Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, DC 20036.

(c) *Time to file.* A petition must be filed with the Commission either within 30 days of receipt of the final decision of the MSPB or within 30 days of when the decision of a MSPB field office becomes final.

(d) *Service.* The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the MSPB, 1120 Vermont Ave., NW., Washington, DC 20419, and the petitioner must certify as to the date and method of service.

#### § 1614.304 Contents of petition.

(a) *Form.* Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice Of Appeal/Petition.

(b) *Contents.* Petitions must contain the following:

(1) The name and address of the petitioner;

(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner or representative, if any.

#### § 1614.305 Consideration procedures.

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission will consider the decision of the MSPB. An agency may oppose the petition, either on the basis that the Commission should not consider the MSPB's decision or that

the Commission should concur in the MSPB's decision, by filing any such argument with the Office of Federal Operations and serving a copy on the petitioner within 15 days of receipt by the Commission.

(b) The Commission shall determine whether to consider the decision of the MSPB within 30 days of receipt of the petition by the Commission's Office of Federal Operations. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within 60 days of the date of its determination, consider the entire record of the proceedings of the MSPB and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the MSPB; or

(2) Issue in writing a decision that differs from the decision of the MSPB to the extent that the Commission finds that, as a matter of law:

(i) The decision of the MSPB constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B); or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(e) Where the EEOC has differed with the decision of the MSPB under § 1614.305(c)(2), the Commission shall refer the matter to the MSPB.

#### § 1614.306 Referral of case to Special Panel.

If the MSPB reaffirms its decision under 5 CFR 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman



of the EEOC the administrative record in the proceeding including—

(a) The factual record compiled under this section, which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

#### § 1614.307 Organization of Special Panel.

(a) The Special Panel is composed of:

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;

(2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened; and

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) *Designation of Special Panel member*—(1) *Time of designation.* Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) *Manner of designation.* Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

#### § 1614.308 Practices and procedures of the Special Panel.

(a) *Scope.* The rules in this subpart apply to proceedings before the Special Panel.

(b) *Suspension of rules in this subpart.* In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule in this subpart is required by statute, suspend the rules in this subpart on application of a party, or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) *Time limit for proceedings.* Pursuant to 5 U.S.C. 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days of the matter being certified to it.

(d) *Administrative assistance to Special Panel.* (1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs

incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) *Maintenance of the official record.* The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) *Filing and service of pleadings.* (1) The parties shall file the original and six copies of all submissions with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:15 a.m.–4:45 p.m.). Due to the short statutory time limit, parties are required to file their submissions by overnight delivery service should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for the overnight delivery service. If the filing is by personal delivery, it shall be considered filed on that date it is received in the office of the Clerk, MSPB.

(g) *Briefs and responsive pleadings.* If the parties wish to submit written argument, briefs shall be filed with the Special Panel within 15 days of the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) *Oral argument.* The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within 15 days of the date of the Board's certification order. Upon receipt of a request for argument, the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) *Post-argument submissions.* Due to the short statutory time limit, no post-argument submissions will be permitted except by order of the Chairman of the Special Panel.

(j) *Procedural matters.* Any procedural matters not addressed in this subpart shall be resolved by written

order of the Chairman of the Special Panel.

#### § 1614.309 Enforcement of Special Panel decision.

The Board shall, upon receipt of the decision of the Special Panel, order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 CFR part 1201, subpart E.

#### § 1614.310 Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

#### Subpart D—Appeals and Civil Actions

##### § 1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final decision, or the agency's dismissal of all or a portion of a complaint.



(b) An agent may appeal the agency decision accepting or dismissing all or a portion of a class complaint, or a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and both may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with § 1614.504.

#### § 1614.402 Time for appeals to the Commission.

(a) Except for mixed case complaints, any dismissal of a complaint or a portion of a complaint or any final decision may be appealed to the Commission within 30 days of the complainant's receipt of the dismissal or final decision. Any grievance decision may be appealed within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with § 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 30 days of receipt of an agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

#### § 1614.403 How to appeal.

(a) The complainant, agent, grievant or individual class claimant (hereinafter complainant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing.

(b) The complainant shall furnish a copy of the appeal to the agency's EEO Director (or whomever is designated by the agency in the dismissal or decision) at the same time that he or she files the appeal with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made on the agency.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal. Following receipt of the appeal and any brief in support of the appeal, the Director, Office of Federal Operations, will request the complaint file from the agency. The agency must submit the complaint file and any agency statement or brief in opposition to the appeal to the Director, Office of Federal Operations, within 30 days of receipt of the Commission's request for the complaint file, which has been made by certified mail. A copy of the agency's statement or brief must be served on the complainant at the same time.

#### § 1614.404 Appellate procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

#### § 1614.405 Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c)

and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to § 1614.407; or

(2) The Commission on its own motion reconsiders the case.

#### § 1614.406 Time limits. [Reserved]

#### § 1614.407 Reconsideration.

(a) Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

(b) A party may request reconsideration of any decision issued under § 1614.405(a) provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such submission. All other parties shall have 20 days from the date of service in which to submit all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there is no further right by either party to request reconsideration of the



decision for which reconsideration was sought.

**§ 1614.408 Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.**

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

**§ 1614.409 Civil action: Equal Pay Act.**

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

**§ 1614.410 Effect of filing a civil action.**

Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

**Subpart E—Remedies and Enforcement**

**§ 1614.501 Remedies and relief.**

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in appendix A of part 1613 of this chapter, which shall

include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1) (i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 CFR 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for

completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 CFR 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) *Relief for an employee.* When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 CFR 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.



(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs.* The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after the complainant has notified the agency that he or she is represented by an attorney, except that fees allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the agency within 30 days of receipt of the decision unless a request for reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be

awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing.

(ii) (A) If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(ii)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(ii)(B).

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

#### § 1614.502 Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided in § 1614.405(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration, when the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph (b) shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reconsideration, that the relief it provides is temporary or conditional.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

#### § 1614.503 Enforcement of final Commission decisions.

(a) *Petition for enforcement.* A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) *Compliance.* On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision,



efforts shall be undertaken to obtain compliance.

(c) *Clarification.* On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) *Referral to the Commission.* Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) *Commission notice to show cause.* The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) *Certification to the Office of Special Counsel.* Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) *Notification to complainant of completion of administrative efforts.* Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

#### **§ 1614.504 Compliance with settlement agreements and final decisions.**

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. A final decision that has not been the subject of an appeal or civil action shall be binding on the agency. If

the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.

#### **Subpart F—Matters of General Applicability**

##### **§ 1614.601 EEO group statistics.**

(a) Each agency shall establish a system to collect and maintain accurate employment information on the race, national origin, sex and handicap(s) of its employees.

(b) Data on race, national origin and sex shall be collected by voluntary self-identification. If an employee does not

voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If the employee still refuses to provide the information, the agency must make visual identification and inform the employee of the data it will be reporting. If an agency believes that information provided by an employee is inaccurate, the agency shall advise the employee about the solely statistical purpose for which the data is being collected, the need for accuracy, the agency's recognition of the sensitivity of the information and the existence of procedures to prevent its unauthorized disclosure. If, thereafter, the employee declines to change the apparently inaccurate self-identification, the agency must accept it.

(c) The information collected under paragraph (b) of this section shall be disclosed only in the form of gross statistics. An agency shall not collect or maintain any information on the race, national origin or sex of individual employees except when an automated data processing system is used in accordance with standards and requirements prescribed by the Commission to insure individual privacy and the separation of that information from personnel record.

(d) Each system is subject to the following controls:

(1) Only those categories of race and national origin prescribed by the Commission may be used;

(2) Only the specific procedures for the collection and maintenance of data that are prescribed or approved by the Commission may be used;

(3) The Commission shall review the operation of the agency system to insure adherence to Commission procedures and requirements. An agency may make an exception to the prescribed procedures and requirements only with the advance written approval of the Commission.

(e) The agency may use the data only in studies and analyses which contribute affirmatively to achieving the objectives of the equal employment opportunity program. An agency shall not establish a quota for the employment of persons on the basis of race, color, religion, sex, or national origin.

(f) Data on handicaps shall also be collected by voluntary self-identification. If an employee does not voluntarily provide the requested information, the agency shall advise the employee of the importance of the data and of the agency's obligation to report it. If an employee who has been



appointed pursuant to special appointment authority for hiring individuals with handicaps still refuses to provide the requested information, the agency must identify the employee's handicap based upon the records supporting the appointment. If any other employee still refuses to provide the requested information or provides information which the agency believes to be inaccurate, the agency should report the employee's handicap status as unknown.

(g) An agency shall report to the Commission on employment by race, national origin, sex and handicap in the form and at such times as the Commission may require.

#### § 1614.602 Reports to the Commission.

(a) Each agency shall report to the Commission information concerning pre-complaint counseling and the status, processing and disposition of complaints under this part at such times and in such manner as the Commission prescribes.

(b) Each agency shall advise the Commission whenever it is served with a federal court complaint based upon a complaint that is pending on appeal at the Commission.

(c) Each agency shall submit annually for the review and approval of the Commission written national and regional equal employment opportunity plans of action. Plans shall be submitted in a format prescribed by the Commission and shall include, but not be limited to:

(1) Provision for the establishment of training and education programs designed to provide maximum opportunity for employees to advance so as to perform at their highest potential;

(2) Description of the qualifications, in terms of training and experience relating to equal employment opportunity, of the principal and operating officials concerned with administration of the agency's equal employment opportunity program; and

(3) Description of the allocation of personnel and resources proposed by the agency to carry out its equal employment opportunity program.

#### § 1614.603 Voluntary settlement attempts.

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any

settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved.

#### § 1614.604 Filing and computation of time.

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is delivered in person or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

#### § 1614.605 Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of documents and decisions on the complainant shall be made on the attorney and not on the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

#### § 1614.606 Joint processing and consolidation of complaints.

Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter, or two or more complaints of discrimination from the same complainant, may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties. The date of the first filed complaint controls the applicable timeframes under subpart A of this part.

#### § 1614.607 Delegation of authority.

An agency head may delegate authority under this part, to one or more designees.

[FR Doc. 92-7811 Filed 4-9-92; 8:45 am]

BILLING CODE 6750-06-M



**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION****29 CFR Part 1614****Federal Sector Equal Employment Opportunity****AGENCY:** Equal Employment Opportunity Commission.**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Commission seeks public comment on requiring, as part of 29 CFR 1614.108(a), published elsewhere in this separate part of today's issue of the *Federal Register*, that investigations be conducted by a certified department or agency. It is the Commission's intention to study whether certification or some other oversight provision is necessary. If such an oversight method is considered necessary, the Commission will promulgate a final regulation on this issue in the future.

**DATES:** Written comments on the proposal must be received on or before January 2, 1993. The Commission proposes to consider any comments received and thereafter may adopt final regulations.

**ADDRESSES:** Comments should be submitted to the Office of the Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, NW., Washington, DC between the hours of 9:30 a.m. and 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Nicholas M. Inzeo, Associate Legal Counsel, Thomas J. Schlageter, Assistant Legal Counsel or Kathleen Oram, Senior Attorney, at (202) 663-4670, FTS 989-4670 or TDD (202) 663-7026. This notice is also available in the following alternative formats: large

print, braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Office of Equal Employment Opportunity at (202) 663-4395, FTS 989-4395 or TDD (202) 663-4399.

**SUPPLEMENTARY INFORMATION:** In a separate rule published elsewhere in this separate part of today's issue of the *Federal Register* the Commission adopted final regulations establishing a new complaint process for complaints of discrimination filed by federal employees. That regulation requires agencies against which a discrimination complaint is filed to conduct a fair and complete investigation within 180 days of the filing of the complaint. The Commission is seeking public comment on whether to require, additionally, that investigations and agency processing be conducted by agencies certified by the Commission.

One of the major objections to the federal sector process has been the conflict of interest in having agencies investigate themselves and be responsible for making all decisions throughout the fact finding process. The comments on the NPRM suggested the use of adverse inference and summary disposition as methods to reduce the unfairness of the process. The Commission has accepted those comments. At the same time, the Commission seeks public comment on other methods to reduce or eliminate the real and perceived unfairness of having agencies responsible for the entire fact finding process.

The impetus for a certification, or any oversight, process is the delay that is common in processing charges under part 1613. That delay by the agency, at least in part, creates the appearance of unfairness in the process.

The Commission seeks public comment on a proposal that investigations be conducted only by

agencies that are certified by the Commission. Agencies would be certified based upon their performance (to include the performance of any contractors under their direction). The Commission would consider the timeliness of investigations, the completeness of investigative files, the extent to which agency decisions are upheld by the Commission on appeal and the training provided to those individuals performing functions under the process.

This proposal would give the Commission the authority to review the performance of agencies and take effective action against any agency that demonstrates after an opportunity to correct deficiencies that it does not process complaints expeditiously and fairly. Standards for certification would be developed based on the timeliness and fairness factors mentioned above and a process for certification would be established through Management Directives. In light of the changes made to the complaint process by part 1614, the Commission seeks comment on whether additional methods of oversight are necessary.

The Commission hereby publishes this notice of proposed rulemaking for public comment. Any method of increased oversight suggested by a comment will be considered by the Commission. Commenters are encouraged to explain any proposed method in as much detail as possible.

**List of Subjects in 29 CFR Part 1614**

Equal employment opportunity,  
Government employees.

For the Commission.

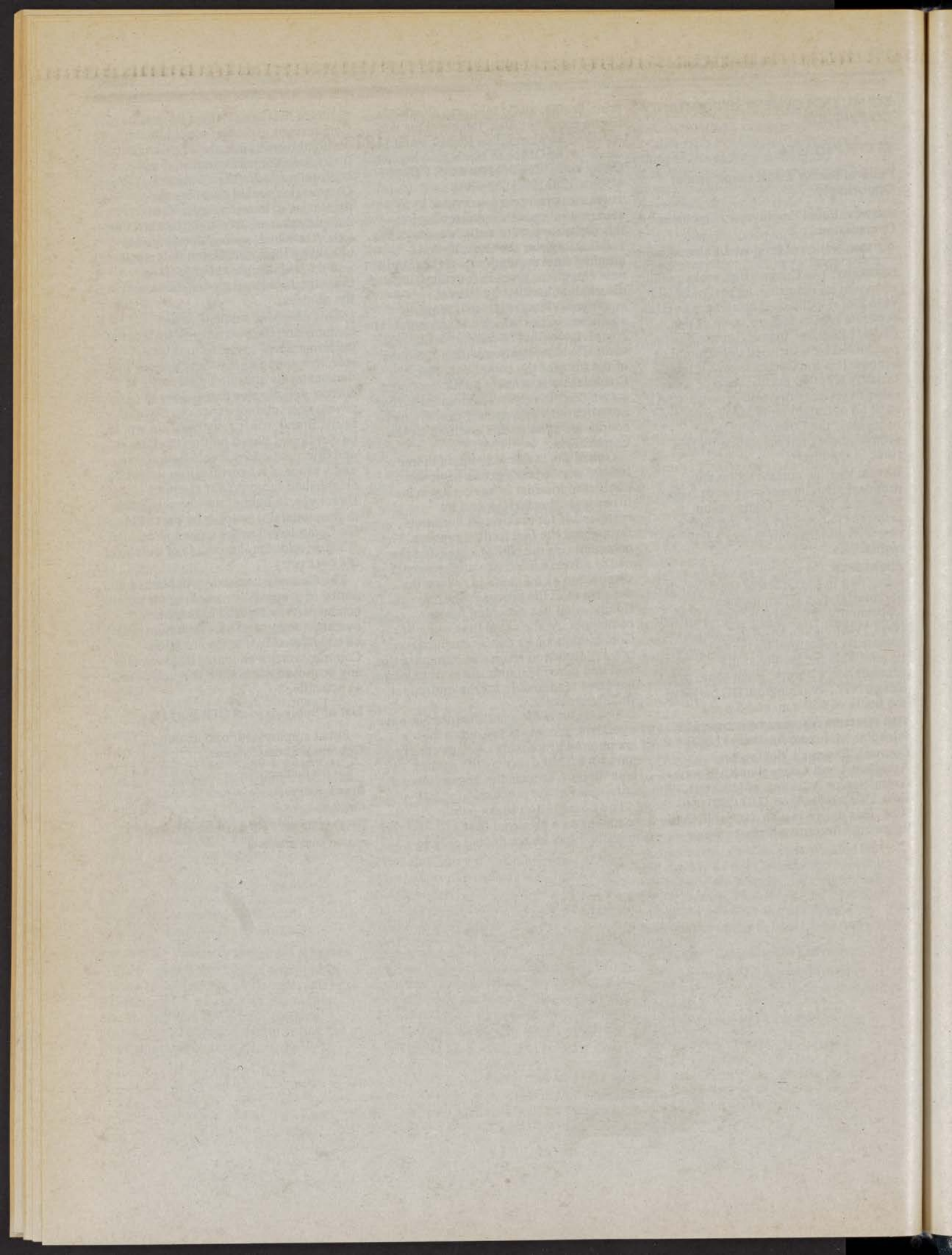
Evan J. Kemp, Jr.,

Chairman.

[FR Doc. 92-8075 Filed 4-9-92; 8:45 am]

BILLING CODE 6750-06-M







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Friday,  
April 10, 1992

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**Part V**

**Pension Benefit  
Guaranty  
Corporation**

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**29 CFR Part 2610**

**Payment of Premiums; Proposed Rule**



# **PENSION BENEFIT GUARANTY CORPORATION**

## **29 CFR Part 2610**

**RIN 1212-AA58**

### **Payment of Premiums**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This is a proposed amendment to the Pension Benefit Guaranty Corporation's regulation on Payment of Premiums (29 CFR part 2610). Comments on the existing regulation by premium payers in recent years and studies by PBGC staff have persuaded the PBGC that the regulation can be simplified to reduce the public burden of compliance and the PBGC's burden of administration. The proposed amendment would make a number of simplifying changes suggested by those comments and studies.

For example, the proposed amendment would replace the existing alternative calculation method with a new simplified filing method using tables of adjustment factors instead of formulas (and would place restrictions on the new method's use by large plans). The definition of the term "participant" in the regulation would be changed to agree with that used for the Form 5500 series annual report. The proposed amendment would also defer the final filing due date (so that it would be closer to the extended Form 5500 due date), raise the number of participants a plan must have in order to be required to make the early premium payment (so that fewer plans would have to file twice a year), and eliminate both penalties and interest on early payments that equal at least a definitely determinable amount (so that both estimates and special safe harbor rules would be unnecessary). It would also accelerate the early filing due date to an earlier date in the premium payment year and widen the scope of the early payment to cover the variable rate, as well as the flat rate, portion of the premium.

**DATES:** Comments on the proposed amendment must be received on or before May 26, 1992.

**ADDRESSES:** Comments may be mailed to the Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington DC, 20006-1860, or delivered to suite 7200 at that address between 9 a.m. and 5 p.m. on business days. Written comments will be available for public inspection at the

PBGC's Communications and Public Affairs Department, suite 7100 at the same address, between 9 a.m. and 4 p.m. on business days.

#### **FOR FURTHER INFORMATION CONTACT:**

Harold J. Ashner, Assistant General Counsel, or Deborah C. Murphy, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington DC 20006-1860; 202-778-8850 (202-778-1958 for TTY and TDD). (These are not toll-free numbers.)

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Section 4006 of the Employee Retirement Income Security Act of 1974 ("ERISA") sets forth the premium rates to be charged by the Pension Benefit Guaranty Corporation ("PBGC"). Section 4007 of ERISA makes the premiums payable "at the time, and on an estimated, advance, or other basis, as determined by the [PBGC]," and provides for the imposition of interest and penalties on premiums not timely paid. Pursuant to these provisions and to section 4002(b)(3) of ERISA, the PBGC has issued its regulation on Payment of Premiums (29 CFR part 2610). The regulation and related forms and instructions describe in detail how to compute and pay premiums, interest, and penalties.

Under section 4006, the multiemployer plan premium for a premium payment year beginning after September 26, 1988, is \$2.60 per participant. The single-employer plan premium for a premium payment year beginning after 1987 is composed of a flat rate per capita assessment and a variable rate assessment that is based on the value of a plan's unfunded vested benefits and is also determined on a per-participant basis. The flat rate assessment (for post-1990 years) is \$19 per participant.

The basic formula for the variable rate assessment for each participant (for post-1990 years) is \$9 for each \$1,000 (or fraction thereof) of a plan's unfunded vested benefits (determined as of the last day of the year before the premium payment year) with that product divided by the number of participants in the plan as of that same date. This variable rate assessment is subject to a statutory ceiling of \$53 per participant, resulting in a maximum per participant premium of \$72.

The formula for computing the variable rate assessment is based, in large part, on the determination of the plan's unfunded vested benefits, defined by statute as the amount that would be the plan's "unfunded current liability" (within the meaning of ERISA section

302(d)(8)(A)) as of the close of the preceding plan year, subject to two qualifications, viz., that only vested benefits are taken into account in the calculation, and that the interest rate used in valuing vested benefits must equal 80% of the annual yield on 30-year Treasury securities for the month preceding the month in which the plan year begins.

The premium regulation provides two methods for determining the amount of a plan's unfunded vested benefits. Under the "general rule" (§ 2610.23(a)), an enrolled actuary must determine the amount of the plan's unfunded vested benefits as of the last day of the plan year preceding the premium payment year based on the plan's provisions and population as of that date, and must certify that the determination was made in a manner consistent with generally accepted actuarial principles and practices. Under the "alternative calculation method" (§ 2610.23(c)), the plan administrator must calculate the amount of the plan's unfunded vested benefits based on certain data from the plan's Form 5500 Schedule B for the plan year preceding the premium payment year, using formulas specified in the regulation. The regulation also provides a number of exemptions and special rules regarding the variable rate portion of the premium.

While the current premium regulation exhibits a degree of complexity, much of this is simply a reflection of the complexity inherent in the statute's variable rate premium provisions, as well as the PBGC's desire to reduce compliance burdens and costs as much as possible by providing options, exemptions, and special rules to simplify or, in some cases, eliminate calculation requirements. Nevertheless, PBGC staff studies have identified a number of possible simplifying changes that would be implemented by this proposed amendment. The PBGC envisions making these proposed changes effective generally for premium payment years beginning after 1992, contingent on implementation of a new computerized premium accounting system by the end of 1992. The proposed changes are discussed below.

##### **General Provisions**

The premium regulation is divided into three subparts. Subpart A (General Provisions) contains rules that apply generally to both single-employer and multiemployer plans for all plan years (although some of these rules are more limited in scope or take different forms depending on the plan year involved). Subpart B currently contains rules



governing only single-employer plans for plan years beginning after 1987; the rules in Subpart C currently cover single-employer plans for plan years beginning before 1988 and multiemployer plans for all plan years.

The proposed amendments would make a minor change to the general organization of the premium regulation by transferring the rules governing multiemployer plan premiums for premium payment years beginning after 1987 from subpart C to subpart B. This would avoid duplication (in subparts B and C) of several provisions that apply to both single-employer and multiemployer plans for post-1987 years only, consolidate current (that is, post-1987) rules in subpart B, and permit most filers to ignore subpart C completely. A minor rewording of § 2610.1(a) would reflect this organizational change; §§ 2610.21 and 2610.31 would be correspondingly reworded.

Similarly, § 2610.22 (Premium rates) would be revised to include multiemployer as well as single-employer premium rate rules for the post-1987 period. Existing § 2610.22(b) (dealing with new and newly covered plans) would be redesignated as § 2610.22(c); a new § 2610.22(b) would be added to set forth the multiemployer premium rates (now found in § 2610.33(a)(1)); and § 2610.22(d) would be modified to reflect the difference between the refund rules for multiemployer plans (currently set forth in § 2610.33(d)) and those for single-employer plans, which form the subject of existing § 2610.22(d). (The provision in existing § 2610.22(c), that the prescribed premiums are payable for short as well as normal plan years, is considered obvious and would simply be removed.)

In addition, the variable rate premium cap reduction rules that make up most of existing § 2610.22(a)(3)—and that apply only to premium payment years beginning before 1993—would be moved to a new paragraph (§ 2610.22(f)) at the end of the section because they would no longer be of current interest to most premium payers. The special rule for new and newly covered plans (moved to § 2610.22(c)) would be modified to refer to both the single-employer and multiemployer premium rate provisions (in § 2610.22(a) and new § 2610.22(b) respectively), and the parallel rule in § 2610.33(b)(2) covering multiemployer plans only would be deleted.

The penalty waiver rule now in § 2610.8(b)(5) would be moved to § 2610.8(b)(4). This rule, which waives penalties accruing within 30 days after the date of a PBGC bill that is paid

within the 30-day period, would be reworded to make its effect clearer.

(Other organizational changes, relating to substantive rule revisions, are discussed below in the context of those revisions.)

#### Definition of "Participant"

The wording of the PBGC's definition of "participant" in § 2610.2 (Definitions) for the purpose of filing and paying PBGC premiums has differed for several years from the wording of the definition prescribed in the instructions for Form 5500. (For example, the definition in the 1990 instructions for Form 5500 excludes "nonvested former employees who have incurred the break in service period specified in the plan," while the corresponding exclusion in existing § 2610.2 applies to "a non-vested former employee who has incurred a break in service the greater of one year or the break in service period specified in the plan." (Emphasis added.)) The difference in wording, coupled with uncertainty about how the two definitions might be interpreted for purposes of the two different filings, has caused concern for many plan administrators that the participant count for PBGC premiums may differ from the Form 5500 participant count in certain cases.

The amendment would redefine the term "participant" for premium payment years beginning after 1992 while retaining the existing definition for premium payment years beginning before 1993 (including those with premium filing dates in 1993). To accommodate the change, § 2610.2 would be reorganized to place most of the defined terms in a new paragraph (a) and the new and old definitions of "participant" in new paragraphs (b) and (c) (respectively). In paragraph (a), definitions would be added for the terms "Form 5500" and "single-employer plan."

The new definition of "participant" in § 2610.2(b) would simply adopt the definition prescribed for purposes of the Form 5500. This change would allow most premium payers to use the same participant count determined for the Form 5500 without having to worry that the difference in definitions might make the count wrong for premium purposes. Since the Form 5500 definition may change (as it has in the past), § 2610.2(b) would refer specifically to the Form 5500 applicable to the plan year preceding the premium payment year. In general, premiums are based on the participant count for the last day of the plan year preceding the premium payment year. New and newly covered plans, and certain plans involved in mergers and

spinoffs, base their premiums on the participant count as of the first day of the premium payment year, but it would be impossible to wait for the issuance of the Form 5500 for the premium payment year and still pay premiums on time. (For new plans, and newly covered plans that were not required to file Form 5500 for the plan year preceding the premium payment year, the definition the plan would use would be the one for the Form 5500 that would have been used for a plan year beginning one year before the first day of the premium payment year.)

For purposes of determining whether a plan is a "large plan" required to make an early premium payment, the participant count comes from the prior year's premium filing. For premium payment years beginning after 1993, this would generally be the same as the participant count on the Form 5500 for the year before the prior year. For example, to determine whether a plan is a "large plan" for the 1994 premium payment year, the plan administrator would note the number of participants for whom premiums had to be paid for the 1993 plan year; since that plan year would have been covered by the new definition of "participant," the participant count for premium purposes would probably have been the same as that on the 1992 Form 5500. (Exceptions would occur where, for example, a plan used the special rule for mergers and spinoffs in § 2610.10 and counted participants as of a date other than the Form 5500's participant count date.)

However, the 1993 premium payment year would be a special case, because the number of participants for whom premiums were payable for 1992 (the prior plan year) might be different than the 1991 Form 5500 participant count (even if the dates were the same). This is because the 1992 plan year would not have been covered by the new "participant" definition—so the 1992 participant count for premium purposes would not necessarily have agreed with the participant count on the 1991 Form 5500. Thus, although the amount of premium due for the 1993 premium payment year would be based on the 1992 Form 5500 participant count, the plan's "large plan" or "small plan" filing status for the 1993 year (based on the number of participants for whom premiums were payable for 1992) might be different than if it were based directly on the 1991 Form 5500 participant count.

#### Miscellaneous Filing Rules

The amendment would revise § 2610.4 to provide expressly for modification of



the premium filing address in the PBGC's Annual Premium Payment Package. This would allow the PBGC to change the address quickly if necessary before completion of the formal procedure of amending the regulation.

Section 2610.5 would be revised to liberalize slightly the rule about when a premium filing or payment is considered to have been made. This rule is used to determine whether a premium filing is timely, when interest on a late payment stops accruing, etc. The current rule, which would be retained in § 2610.5(b) for premium payment years beginning before 1993, is that filings are deemed made when mailed, as evidenced by a legible U.S. Postal Service postmark, or three days before receipt by the PBGC if they do not contain a legible U.S. Postal Service postmark.

In new § 2610.5(a)(1), the proposed rule would increase the assumed transit time (between when a filing is received and when it is deemed to have been sent) from three days to five and make it applicable to all filings, including those with legible U.S. Postal Service postmarks. It would also make clear that the PBGC would accept other evidence of the date of mailing besides legible postmarks.

In addition, new § 2610.5(a)(2) would clarify that where a filing is received on the first business day following a period of one or more non-business days (Saturdays, Sundays, or holidays), it would be deemed received on the first day of the non-business period—i.e., the earliest day when it might have been received but for the non-business period.

Application of the transit time assumption to filings with legible U.S.P.S. postmarks would eliminate an anomaly under the existing rule. Currently, a filing mailed one day late with a legible U.S.P.S. postmark would be considered late even if it were received the next day, whereas a filing mailed a day late bearing a legible postage meter postmark (but no U.S.P.S. postmark) would be considered timely if it arrived the following day.

The new rule would be effective only for filings and payments for premium payment years beginning after 1992; thus the current rule would continue to apply (for example) to filings due in 1993 for the 1992 premium payment year.

In subpart B of the regulation, the amendment would simplify the certification that is required of fully insured plans taking advantage of the exemption from the variable rate premium under § 2610.24(a)(3). Currently, the plan administrator must certify to the plan's satisfaction of the requirements of section 412(i) of the Internal Revenue Code and regulations

thereunder throughout the plan year preceding the premium payment year or (for new or newly covered plans) throughout the premium payment year up to the premium due date.

The PBGC has reconsidered these provisions in light of the general principle that liability for the variable rate premium is determined as of a single "snapshot date," rather than on the basis of a plan's status over an extended period of time. Consistent with that general principle, the PBGC has decided that the certification required of a section 412(i) plan administrator under § 2610.24(a)(3) should be limited to the "snapshot date." (This certification as of the premium "snapshot date" would be relevant only for premium purposes, and would not govern the plan's status under section 412(i) and the regulations thereunder.) Such a change would also avoid the current rule's implication that the plan administrator of a new or newly covered plan must either wait until the premium due date to file, or certify to the status of the plan for a period of time that is still in the future when the certification is made.

Since § 2610.24(e) automatically corrects § 2610.24(a) "snapshot dates" for new or newly covered plans, amended § 2610.24(a)(3) would no longer have to include an explicit special provision for such plans.

#### Short Plan Year Credits

The amendment would supplement the special refund rule in § 2610.22(d) with a new special credit rule for short plan years of new and newly covered plans and plans that change their plan years. Under the existing premium regulation, the refund rule in §§ 2610.22(d) and 2610.33(d) is the only mechanism available to such a plan for recovering a prorated portion of the premium for the short year. The plan must prepare and submit a refund request, and the PBGC must process the request and issue the refund. Under proposed new § 2610.22(e), these two burdens would be eliminated. The plan would simply compute the credit, in the same manner as a refund under § 2610.22(d), and claim it on its premium payment form. (The refund rule under § 2610.22(d)—with some rewording to make it applicable to multiemployer as well as single-employer plans and to clarify its operation—would remain as an option.)

A new or newly covered plan would be allowed to take the credit against the short first year's premium; a plan that changed its plan year could take the credit against the premium for the following full-length year. The difference in treatment reflects differences

between the two classes of plans. For a new or newly covered plan, it is the beginning of the plan year—the portion before the plan becomes effective for premium purposes—that generates the credit, and the plan knows from the start how long its first plan year will be. In contrast, changes in plan year are typically made after the beginning of what will turn out to be the short year (and often after the short year is over), and it is the end of the plan year—the portion overlapped by the following full year—that generates the credit. (By the same token, the credit rule would not apply to final short years (of terminating plans described in § 2610.22(d) (3) and (4)) because the date of the short year's end would not generally be known until it arrived and because there would be no following year's premium to apply the credit to.)

Under the proposed new credit rule, the credit could be taken against the premium for a premium payment year beginning after 1992. Accordingly, it would apply to a new or newly covered plan's short first year beginning after 1992 (since the credit would be taken against that same year's premium). For a plan changing plan years, the new rule would permit a credit to be taken against the premium for a full plan year beginning after 1992 with respect to an immediately preceding short year.

#### Simplified Filing Method

The alternative calculation method ("ACM") for unfunded vested benefits, provided for in current § 2610.23(c), is an easier, though less accurate, method of calculating the amount of unfunded vested benefits ("UVBs")—on which the variable rate premium is based—than the general rule described in § 2610.23 (a) and (b). Whereas the general rule prescribes standards for the actuarial determination of UVBs from basic data, the ACM provides formulas (and optional tables of substitution factors that may be used in place of one expression in one of the formulas) for calculating UVBs from data reported on Form 5500 Schedule B for the prior year.

Both the general rule and the ACM yield values for UVBs as of the last day of the plan year preceding the premium payment year, the "snapshot date" for computing the variable rate premium. The Schedule B data on which the ACM is based, however, are as of the first, not the last, day of that prior year. In addition to other adjustments that may be necessary, therefore, the ACM must "bring forward" the data to the end of the prior year. Rather than bring each figure forward separately, the ACM uses the data to calculate UVBs as of the first



day of the prior year, then brings just the UVB figure forward by adding interest.

The ACM begins with the values of the current liability for vested benefits reported on Schedule B as of the beginning of the plan year preceding the premium payment year. In § 2610.23(c)(1), it increases those benefit values to reflect accruals for active participants during that plan year. Then, in § 2610.23(c)(2), it adjusts the benefit values to account for any difference between the current liability interest rate (or rates) actually used to determine them (the "Funding Interest Rate(s)") and the interest rate prescribed by the statute and § 2610.23(b)(1) for premium purposes (the "Premium Interest Rate"). The adjusted vested benefit values are added together to give a single figure reflecting all adjusted vested benefits as of the first day of the plan year preceding the premium payment year.

In § 2610.23(c)(4), the ACM begins with the asset value reported on Schedule B as of the beginning of the plan year preceding the premium payment year and increases that value to reflect contributions made since the beginning of the preceding plan year. The result is an adjusted value of assets as of the beginning of that year. The difference between adjusted vested benefits as of the beginning of the year before the premium payment year and the adjusted asset value as of the same date is the UVBs as of that date. Finally, in § 2610.23(c)(5), the ACM adjusts that UVB figure by adding interest (at the Premium Interest Rate) from the first day of the year before the premium payment year (i.e., the day as of which the UVBs were calculated) to the end of that year (i.e., the day before the beginning of the premium payment year). This in effect produces a value of UVBs as of the last day of the plan year preceding the premium payment year.

Small plans (which, for this purpose, means those paying premiums for fewer than 500 participants) use this UVB value directly as the basis for determining the amount of the variable rate premium. Under § 2610.23(d), however, large plans (those paying premiums for 500 or more participants) must correct this UVB value for any significant events, as defined in § 2610.23(d), that may have occurred during the prior year (i.e., between the date of the Schedule B data and the premium "snapshot date"). (The same significant events must be taken into account under the general rule.)

The PBGC introduced the ACM, when the variable rate premium was first added to ERISA, in response to its concern that the method described in

the statute for determining UVBs (which is tracked by the general rule in the regulation) would be quite expensive and time-consuming to apply, especially for smaller plans. The ACM was designed for ease of use, with the thought that it would give small plan administrators a way to calculate variable rate premiums from Form 5500 Schedule B data without the services of an actuary. Indeed, the PBGC expected most plans, including large plans, to use the ACM routinely and to resort to the more difficult general rule only when unusual circumstances made it apparent that the general rule results would be much more favorable than the ACM results.

Of course, achieving simplicity meant sacrificing accuracy. The ACM was devised on the basis of the soundest actuarial principles and most effective actuarial techniques available to be an unbiased surrogate for the general rule both in the aggregate and for most plans individually. However, the PBGC recognized that UVBs (and thus premiums) calculated with the ACM would vary from what they would be under the general rule, and would in some cases be substantially different. Weighing the expected magnitude of premium variations under the ACM against the perceived need for relief from the burdens of the general rule, the PBGC concluded that the risks arising from the ACM's inaccuracy were acceptable.

Having reassessed these considerations in connection with its premium simplification efforts, the PBGC now believes that the balance has shifted. On the one hand, the major premium increase in 1991 means that the effect on premiums of any given variation in UVBs is half again as great as it was in 1988. On the other hand, a number of actuarial consulting firms report that many large plans that expect to pay variable rate premiums routinely calculate them under both the ACM and the general rule and pay the smaller amount, thus suggesting that general rule determinations are considerably less burdensome than the PBGC initially feared, at least for larger plans. Accordingly, there now appears to be cause for concern that the PBGC may be exposed to possibly significant revenue loss in individual cases where the ACM is selected over the general rule specifically because the former yields a lower premium than the latter.

In addition, it appears that the ACM is not as easy to use as the PBGC initially thought. Adjustment of the Schedule B data under the ACM requires the use of formulas with several terms and factors, including expressions with negative

and/or fractional exponents, that some small plan administrators evidently find daunting. Despite the ACM's ease of use in comparison to the general rule, the PBGC has received complaints about its complexity.

The PBGC proposes to address these problems by replacing the ACM with a simpler procedure and restricting the new procedure's use by large plans. The PBGC has devised a simplified filing method ("SFM") that is even easier to use than the ACM, with the hope that more small plan administrators will be able to use the SFM to compute premiums without the assistance of an actuary than appears to be the case with the ACM. The new SFM eliminates all of the existing ACM formulas and replaces them with tables of adjustment factors and simple arithmetical rules. Under the proposed amendment, the SFM would replace the ACM for all plan years beginning after 1992. However, as discussed in detail below, plans paying premiums for 500 or more participants would not be allowed to use the SFM if their UVBs as determined under the SFM were less than if they had used the general rule.

(The PBGC invites public comment regarding what proportion of plans of various sizes routinely determine UVBs under both the ACM and the general rule before they decide which method to use for paying premiums, whether they do it in all cases or only, for example, when an ACM calculation shows some amount of UVBs, and whether the general rule determinations made for this purpose are full final determinations on which a premium filing could be based or merely trial determinations that cost substantially less than full determinations and that are intended only as a basis for deciding whether full determinations should be made. Similarly, the PBGC invites comment regarding whether a significant number of plans that currently calculate UVBs under the ACM without making a general rule determination would encounter obstacles to timely filing (involving, e.g., general rule data collection) under the PBGC's proposed restriction on the use of the SFM by larger plans and what (if anything) might be done in the context of this proposed amendment to alleviate any such problems.)

#### Overview of the SFM

Like the ACM, the SFM would start from figures reported on Form 5500 Schedule B as of the beginning of the plan year preceding the premium payment year; add accruals and contributions for that year; correct for



any difference between the current liability interest rate(s) (the "Funding Interest Rate(s)") actually used and the required interest rate under § 2610.23(b)(1) (the "Premium Interest Rate"); and bring the resulting UVB figure forward to the end of the plan year preceding the premium payment year by adding interest at the Premium Interest Rate. Unlike the ACM, however, the SFM would use no formulas. Instead, it would provide two tables of factors for adjusting the Form 5500 vested benefit figures to reflect the difference between the Premium Interest Rate and the Funding Interest Rate and give additional simple arithmetic rules (involving only addition, subtraction, and multiplication) for making other adjustments to the Form 5500 figures and the resulting UVB figure. The factors in the tables would replace the ACM interest adjustment formula and related tables in current § 2610.23(c) (2) and (3). The additional simple arithmetical rules would replace the

provision that adjusts assets for contributions under current § 2610.23(c)(4) and the formula in current § 2610.23(c)(5) that adjusts UVBs for the passage of time. The ACM adjustment for accruals in current § 2610.23(c)(1), which is now based on a percentage of vested benefits, would be replaced by an adjustment based on the amount of accruals reported on the Schedule B.

Perhaps the best way to introduce the proposed SFM is to work through an example showing how it would be used to compute UVBs in a simulated premium filing. Accordingly, assume that a small calendar year plan, for which the plan administrator is computing the 1993 variable rate premium using the SFM, has the following data on its Schedule B for 1992:

Item 6d (current liability for vested benefits as of 1/1/92)—

(i) (retirees and beneficiaries): \$40,000;

(ii) (terminated vested participants): \$10,000;

(iii) (active participants): \$110,000;

Item 6e (increase in current liabilities for accruals in 1992): \$8,000;

Item 7 (total employer and employee contributions for 1992): \$10,000;

Item 8b (actuarial value of assets—assume as of 1/1/92): \$100,000;

Item 12c(i) (current liability interest rates (Funding Interest Rates))—

Pre-retirement: 8.0 percent; Post-retirement: 7.625 percent;

Item 12d (assumed retirement age): 62.

The interest rate required under § 2610.23(b)(1) (the Premium Interest Rate) that the plan administrator would use would be that for January 1993; assume that it is 7.91 percent. Finally, the plan administrator would have to refer to the tables of adjustment factors in proposed § 2610.23(c)(3). For convenience, a portion of each table is reproduced here; their use is explained as the example proceeds.

TABLE 1

[To be used when the Premium Interest Rate is less than the Funding Interest Rate]

Column A		Column B	Column C			
If the Funding Interest Rate minus the Premium Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60-61	for ages 62-63	for ages over 63
0.01	0.25	1.02	1.04	1.04	1.05	1.05
.26	.50	1.03	1.08	1.09	1.10	1.11
.51	.75	1.05	1.12	1.13	1.15	1.16

TABLE 2

[To be used when the Premium Interest Rate equals or exceeds the Funding Interest Rate]

Column A		Column B	Column C			
If the Premium Interest Rate minus the Funding Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60-61	for ages 62-63	for ages over 63
0.00	0.25	1.00	1.00	1.00	1.00	1.00
.26	.50	.98	.97	.96	.96	.95
.51	.75	.97	.95	.92	.91	.91

To find the plan's 12/31/92 UVBs in order to compute the 1993 variable rate premium, the plan administrator would take the following steps:

Step 1: Adjust the 1/1/92 Benefit Value for Retirees and Beneficiaries

The plan administrator's first step is to adjust the 1/1/92 value of vested benefits for retirees and beneficiaries to reflect the difference between the Funding Interest Rate used to value those benefits and the Premium Interest

Rate mandated by the statute. The unadjusted benefits value is on line 6d(i) of the Schedule B: \$40,000. The adjustment factor depends on the difference between the Funding Interest Rate and the Premium Interest Rate; for retiree benefits, the Premium Interest Rate is compared with the post-retirement Funding Interest Rate. The SFM table headings tell which table the adjustment factor should come from. In this case, the factor comes from Table 2, because the Premium Interest Rate (7.91

percent) is greater than the applicable Funding Interest Rate (7.625 percent). The adjustment factor comes from the second row of Table 2, because the difference between the Premium Interest Rate and the Funding Interest Rate is in the 0.26-0.50 range on the second row of column A of Table 2 (7.91 minus 7.625 is 0.285, which rounds up to 0.29 percentage points). Following this row over to column B leads to the adjustment factor for the line 6d(i) amount. The factor is 0.98. Multiplying



\$40,000 by 0.98 gives \$39,200. This is the adjusted 1/1/92 value of vested benefits for retirees and beneficiaries.

#### Step 2: Adjust the 1/1/92 Benefit Value for Terminated Vested Participants

The second step is very much like the first. Here, the plan administrator adjusts the 1/1/92 value of vested benefits for terminated vested participants to reflect the difference between the Funding Interest Rate and the Premium Interest Rate. This unadjusted benefits value is on line 6d(ii) of the Schedule B: \$10,000. Once again, the adjustment factor depends on the difference between the Funding Interest Rate and the Premium Interest Rate, but where (as here) the pre- and post-retirement Funding Interest Rates are different, the plan administrator must compare the greater of the two Funding Interest Rates with the Premium Interest Rate to get the adjustment factor for terminated vested participants' benefits. In this case, the pre-retirement Funding Interest Rate (8.0 percent) is greater than the post-retirement Funding Interest Rate (7.625 percent). For this step, therefore, the adjustment factor comes from Table 1, because the Premium Interest Rate (7.91 percent) is less than the applicable Funding Interest Rate (8.0 percent). The adjustment factor comes from the first row of Table 1, because the difference between the Premium Interest Rate and the Funding Interest Rate is in the 0.01-0.25 range on the first row of column A of Table 1 (8.0 minus 7.91 is 0.09 percentage points).

Since terminated vested participants have not yet retired, the adjustment factor for the value of their benefits also depends on the plan's assumed retirement age. The assumed retirement age for this plan is 62. So the plan administrator follows the first row of Table 1 over to column C and then looks in the subcolumn headed "for ages 62-63" for the adjustment factor for the line 6d(ii) amount. The factor is 1.05. Multiplying \$10,000 by 1.05 gives \$10,500. This is the adjusted 1/1/92 value of vested benefits for terminated vested participants.

#### Step 3: Adjust the 1/1/92 Benefit Value for Active Participants

The third step is almost the same as the second. Here, the plan administrator adds accruals for 1992 to the 1/1/92 value of vested benefits for active participants and adjusts the sum to reflect the difference between the Funding Interest Rate and the Premium Interest Rate. The unadjusted benefits value for active participants is on line 6d(iii) of the Schedule B: \$110,000. The

current liability increase for 1992 accruals is on line 6e of the Schedule B: \$8,000. The sum of these two figures is \$118,000. The plan administrator uses the same Funding Interest Rate, and thus the same table (Table 1) and row (the first row), to find the adjustment factor for active participants' benefits as was used for terminated vested participants' benefits in step 2. The plan administrator also uses the same column (C) and subcolumn (for ages 62-63) as in step 2. So the adjustment factor for the line 6d(iii) amount is the same as that for the line 6d(ii) amount: 1.05. Multiplying \$118,000 by 1.05 gives \$123,900. This is the adjusted 1/1/92 value of vested benefits for active participants.

The sum of the three adjusted 1/1/92 vested benefits values is therefore \$173,600 (\$39,200 + \$10,500 + \$123,900), and this is the total value of vested benefits as of 1/1/92 that will be used in computing 1/1/92 UVBs in step 5 below.

#### Step 4: Adjust the 1/1/92 Value of Plan Assets

In this step, the plan administrator adjusts the 1/1/92 value of plan assets to reflect contributions for 1992. The unadjusted plan asset value comes from line 8b of the Schedule B: \$100,000. The total 1992 contributions come from item 7 of the Schedule B: \$10,000. The contributions (which may have been made on various dates in 1992 and 1993) are discounted back to 1/1/92 by multiplying them by 0.95. (The SFM uses this same discount factor no matter what the Premium Interest Rate is and no matter when the contributions were actually made.) Multiplying \$10,000 by 0.95 gives \$9,500 as the discounted value of the contributions. Then adding the discounted contributions to the unadjusted assets value gives \$109,500 (\$100,000 plus \$9,500). This is the adjusted value of plan assets as of 1/1/92.

#### Step 5: Compute the UVBs

In this step, the plan administrator computes the 1/1/92 UVBs and then adjusts them so that the adjusted figure can be used as 12/31/92 UVBs. The 1/1/92 UVBs are equal to the total adjusted 1/1/92 vested benefits (from steps 1, 2, and 3) minus the total adjusted 1/1/92 assets (from step 4). At the end of step 3, the total adjusted 1/1/92 benefits were found to be \$173,600; in step 4, the total adjusted 1/1/92 assets were found to be \$109,500. So the 1/1/92 UVBs are \$64,100 (\$173,600 minus \$109,500). To adjust this 1/1/92 figure for use as a 12/31/92 figure, the plan administrator adds interest using the Premium Interest Rate as the interest rate. Since the Premium

Interest Rate is 7.91 percent, the 1/1/92 UVBs are multiplied by 1.0791 (1 plus the Premium Interest Rate) to yield \$69,170.31. This is the UVBs as of 12/31/92. The plan administrator then uses this UVB figure to determine the plan's variable rate premium.

#### Details of the SFM

The SFM, applicable to premium payment years beginning after 1992, would be set forth in § 2610.23(c), and the ACM, limited to premium payment years beginning before 1993, would be transferred to a new § 2610.23(f). New § 2610.23(c)(1), like the introductory text of existing § 2610.23(c), would be a summary or general statement of how the method would work, and § 2610.23(c)(2)-(7) would provide the detailed rules. The tables of factors to be applied to the vested benefit values, and general rules for their use, would be in § 2610.23(c)(2). (To avoid possible confusion, the SFM tables would be called Tables 1 and 2 to distinguish them from ACM Tables A and B.) Section 2610.23(c)(3)-(5) would contain specific adjustment rules for the vested benefits of retirees and beneficiaries, terminated vested participants, and active participants respectively. Section 2610.23(c)(6) would provide for adjusting plan assets, and § 2610.23(c)(7) for determining and adjusting UVBs.

Use of the SFM, as of the ACM, would be restricted for plans paying premiums for 500 or more participants, but the restrictions would now be more stringent. The ACM requires such plans to make adjustments for any significant events described in § 2610.23(d), and the SFM would continue this requirement, which would be stated explicitly in new § 2610.23(c)(1) instead of just in § 2610.23(d) as at present. In addition, § 2610.23(c)(1) would allow such plans to use the SFM only if the amount of their UVBs determined under the general rule were not greater than that calculated with the SFM. An enrolled actuary would be required to certify to that fact if the SFM were used, and if an audit found that the general rule UVBs were greater, the amount of any premium deficiency (and related interest and penalties) would be based on the (higher) general rule figure.

As discussed above, this new restriction is proposed as a response to concerns that the PBGC may be exposed to significant revenue losses in individual cases where large plans select the ACM over the general rule because calculations with both methods show that use of the ACM minimizes UVBs. The PBGC believes that the new rule will solve this problem without



imposing substantial additional administrative costs on plans. A study of premium filings suggests that more than four-fifths of single-employer plans pay no variable rate premiums; for most of those plans, the absence of UVBs is likely to be obvious even before any calculations are done. As for large plans whose funding status is not so clear, the PBGC has reason to believe, as noted above, that calculations under both the general rule and the ACM are already routinely done as part of the premium payment process.

The SFM would also include another new limitation (applicable to all plans). Section 2610.23(c)(1) would provide that the SFM could be used only if the Premium Interest Rate prescribed under § 2610.23(b)(1) were not more than six percentage points less than the plan's Funding Interest Rates from its Schedule B. This limitation would be needed because use of the tables in new § 2610.23(c)(3) would be mandatory under the SFM (unlike the ACM, in which use of the tables is optional), and Table 1 would only cover Funding Interest Rates up to six percentage points higher than the Premium Interest Rate. The restriction of Table 1 to a six-point spread reflects two considerations. One is that the SFM makes simplifying assumptions about interest rates, and these assumptions introduce inaccuracies that, though relatively small when the Funding Interest Rate is close to the Premium Interest Rate, become more significant when the rates diverge further. The other is that, because of the way the Premium Interest Rate and the permissible range of the Funding Interest Rate are set by statute, a six-point spread between them is extremely unlikely. (Although no limitation would be placed on use of the SFM by a plan whose Funding Interest Rate (or Funding Interest Rates) was (or were) lower than the Premium Interest Rate, no matter how great the spread, the adjustment factors provided for spreads greater than six points would be the same as for a six-point spread. A six-point spread when the Funding Interest Rate is lower than the Premium Interest Rate is considered even less likely than when the Funding Interest Rate is higher.)

In addition to setting forth the two tables of vested benefit adjustment factors, proposed § 2610.23(c)(2) would describe how to select a table and a row within a table in finding each adjustment factor. The benefit adjustment factors would adjust the vested benefit values for the difference between the Premium Interest Rate and the Funding Interest Rate, and this

difference would accordingly determine the table and row from which each adjustment factor would be taken. The Premium Interest Rate in the SFM is the same as the quantity called "RIR" in the ACM, viz., the rate prescribed in § 2610.23(b)(1) for the month in which the premium payment year began. The Funding Interest Rate would be one of the rates entered in the pre- or post-retirement column of line 12c(i) on the Schedule B. The pre- and post-retirement Funding Interest Rates are the same as the ACM's BIA and BIR respectively.

Since choosing a table and row would depend on the Funding Interest Rate applicable to each vested benefit amount, § 2610.23(c)(2) would refer to the specific adjustment rules for the three vested benefits amounts (in § 2610.23(c)(3)-(5)) for the Funding Interest Rate to be used for each adjustment. If the Premium Interest Rate were less than the applicable Funding Interest Rate, Table 1 would be used; if the Premium Interest Rate were equal to or greater than the Funding Interest Rate, Table 2 would be used. To find the proper row in the table, the difference between the Funding Interest Rate and the Premium Interest Rate (determined by subtracting the smaller of the two from the larger) would be rounded to the nearest hundredth of a percent. (For example, 1.035 percentage points would round to 1.04 points, and 0.374 percentage points would round to 0.37 points.) One would then locate the rate range in column A of the table that included the difference between the Premium Interest Rate and the applicable Funding Interest Rate. Each row would cover a difference range of one-quarter of one percent. The appropriate factor for the particular combination of Premium Interest Rate and Funding Interest Rate would be found on that row in the appropriate column of the table. The specific adjustment rules for the three vested benefits amounts in § 2610.23(c)(3)-(5) would also tell which column (and, for line 6d(ii) and 6d(iii) adjustments, which subcolumn) of the appropriate table to use for each adjustment.

Under § 2610.23(c)(3), the post-retirement Funding Interest Rate would be used to find the factor for adjusting the value from line 6d(i) of the Schedule B, since that is the rate used to value retiree benefits for the Schedule B. The appropriate column for the line 6d(i) adjustment factor would be column B. The adjusted line 6d(i) amount under § 2610.23(c)(3) would simply be the unadjusted amount from that line multiplied by the factor found in the

appropriate table following the rules in § 2610.23(c)(2) and (3).

The benefits of active and terminated vested participants may be valued using two rates, one for the pre-retirement period and another for the post-retirement period. To simplify the SFM, only one rate would be used to find the adjustment factors for these values. In order to avoid premium losses to the PBGC, § 2610.23(c)(4) and (5) would require that the greater of the pre- and post-retirement Funding Interest Rates be used to find the adjustment factors for the values from lines 6d(ii) and 6d(iii) of the Schedule B.

The appropriate column for the line 6d(ii) and 6d(iii) adjustment factors would be column C. To find the factors, the assumed retirement age reported on line 12d of the Schedule B would be used to select the proper subcolumn of column C. (The assumed retirement age in the SFM is the same as the assumed retirement age used in the ACM.) Each subcolumn is headed by a range of ages: under 60, 60-61, 62-63, and over 63. The subcolumn used would be the one whose heading included the assumed retirement age.

In addition to specifying the Funding Interest Rate, column, and subcolumn to be used in adjusting the line 6d(ii) amount, § 2610.23(c)(4) would provide simply that the adjusted line 6d(ii) amount would be the unadjusted amount from that line multiplied by the factor found in the appropriate table following the rules in § 2610.23(c)(2) and (4). Section 2610.23(c)(5), on the other hand, would require that the unadjusted line 6d(iii) amount be increased by the amount of the expected current liability increase for benefits accruing during the plan year preceding the premium payment year—from line 6e of the Schedule B—before being multiplied by the adjustment factor. The line 6d(iii) factor would be the same as the line 6d(ii) factor because it would be based on the same Funding Interest Rate and assumed retirement age.

The use of the expected current liability increase figure from line 6e of the Schedule B represents a change from the ACM, which approximated accruals as an amount equal to seven percent of the combined vested benefits of active and terminated vested participants—no accrual figure having been available on the Schedule B when the ACM was devised. While the line 6e figure is typically determined as of the first day of the plan year, it need not be; the use of a later date would make benefit liabilities under the SFM higher than if the determination were made as of the beginning of the plan year, because the



SFM would add the line 6e figure, without discount, to the value of active participants' vested benefits as of the first day of the plan year from line 6d(iii) of the Schedule B. The line 6e figure may also include nonvested as well as vested accruals, and this also would tend to inflate benefit liabilities. However, the PBGC believes that the amount of any such inflation would typically be minimal. In any event, a plan would be free to use the general rule to avoid any disadvantage that the SFM might cause either by not providing a discount or by including nonvested accruals.

The three adjusted vested benefits values determined under § 2610.23(c)(2)-(5) would be added together to give a total adjusted value of vested benefits for computing UVBs under proposed § 2610.23(c)(7).

The factors in Tables 1 and 2 in § 2610.23(c)(2) have been derived from formulas similar to the formulas prescribed under the ACM. Each column B factor is equal to  $0.94^D$ , where D is equal to the Premium Interest Rate minus the Funding Interest Rate. However, the factor in each row is used for a range of D's—the ranges shown in column A of each table. To avoid premium losses to the PBGC, the Table 1 factors are derived using the highest percentage point difference in each range, while the Table 2 factors are derived using the lowest difference in each range. For example, in the third row of Table 1, D would be -0.75, but in the third row of Table 2, D would be 0.51.

Similarly, each column C factor is equal to the column B factor from the same row multiplied by  $((107-D)/107)$  (with "ARA" standing for the plan's assumed retirement age). However, the factor in each subcolumn of column C is used for a range of assumed retirement ages—the ranges shown in the subcolumn headings. To avoid premium losses to the PBGC, the Table 1 factors are derived using assumed retirement ages from the high end of each range, while Table 2 factors are derived using assumed retirement ages from the low end of each range. (The low end of the under-60 range is assumed to be 55, and the high end of the over-63 range is assumed to be 65.) Thus, for example, in the 60-61 subcolumn of Table 1, an assumed retirement age of 61 is used, but in the same subcolumn of Table 2, the assumed retirement age used is 60.

While the ACM uses both pre- and post-retirement interest corrections in its formula for adjusting the benefit values for active and terminated vested participants, the formulas used to generate the SFM tables refer to only

one interest figure for these participants—either the pre- or post-retirement Funding Interest Rate, whichever is greater. To avoid having different tables for different values of Premium Interest Rate, the SFM formulas also use a simplified version of the fraction expressing the ratio of the Funding Interest Rate to the Premium Interest Rate. Since the value of this fraction depends mostly on the spread between the Funding Interest Rate and the Premium Interest Rate, rather than on their actual values, the SFM formulas use a fraction based on the actual spread and an assumed Premium Interest Rate of 7.00 percent. This assumed value of Premium Interest Rate represents a rough historical average of actual Premium Interest Rates; if Premium Interest Rates begin to deviate significantly from the assumed value, the PBGC may find it appropriate to issue new tables based on a different assumed value.

Proposed § 2610.23(c)(6) would provide rules for adjusting the value of plan assets taken from Schedule B. As under the ACM (§ 2610.23(c)(4) of the existing regulation), the basic figure would come from line 8b, unless that figure were determined as of a date other than the first day of the prior plan year, in which case the figure would come from line 6c. However, the SFM would provide a simplified procedure for adjusting that basic figure.

Like the existing adjustment procedure, the new procedure in proposed § 2610.23(c)(6) would correct for any contributions made for the plan year preceding the premium payment year. The value of assets as of the first day of that prior year, whether from line 8b or line 6c of the Schedule B, must exclude any contributions made for that year. (Of course, contributions for the year before the prior year are includible in the value of assets as of the beginning of the prior year only if actually made before the Schedule B for the prior year is filed.) The assets figure must therefore be increased to reflect contributions for the prior year.

The amount of contributions made for the prior year would be taken from columns (b) and (c) of item 7 of the Schedule B. The contributions would then have to be discounted to reflect the fact that they were paid after the date as of which the plan assets figure was determined (the beginning of the prior year). In order to simplify this step, § 2610.23(c)(6)(i) would use a flat discount factor of 0.95, so that the discounted contributions amount would be the total contributions amount times 0.95. This flat discount factor reflects an assumption that all of the contributions

being discounted would have been made about three-quarters of the way through the prior year and that the discount rate would be about 7.00 percent (the same value assumed for the Premium Interest Rate in the simplified ratio between the Funding Interest Rate and the Premium Interest Rate that is used in the formulas for generating the benefit adjustment tables in § 2610.23(c)(2)). To the extent that the weighted average contribution date were earlier or the Premium Interest Rate were lower, these assumptions would result in a higher variable rate premium. However, the PBGC believes that relatively few plans receive contributions so early as to be seriously disadvantaged by the SFM's assumed weighted average contribution date. In any event, the SFM is an optional procedure that plans need not use. (The flat discount factor, like the tables of benefit adjustment factors in § 2610.23(c)(2), might be changed if Premium Interest Rates were to deviate significantly from historical values.)

Under proposed § 2610.23(c)(7), the adjusted assets value (computed under proposed § 2610.23(c)(6)) would be subtracted from the adjusted benefits value (computed under proposed § 2610.23(c)(2)-(5)) to yield the value of UVBs at the beginning of the plan year preceding the premium payment year, and this figure would be brought forward to the end of the prior year by multiplying it by the sum of one plus the Premium Interest Rate (expressing the Premium Interest Rate as a decimal fraction of 1, not as a percentage).

The ACM uses a somewhat more complicated method for adjusting the UVBs figure, expressed in a formula that compensates for the possibility that the plan year preceding the premium payment year may be a short year. By ignoring that possibility, the SFM would be simpler, but would produce a higher UVB amount, and therefore a higher variable rate premium, for a premium payment year that followed a short plan year. The PBGC believes that the increased simplicity of the SFM in this regard outweighs the detriment to plans in the relatively infrequent situations where there is a short plan year, especially in view of the fact that the SFM (like the ACM) would be an optional computation method.

Taking into account the aggregate effect of all of the differences between the ACM and the SFM, the PBGC believes that its aggregate premium receipts from plans using the SFM would be neither less than nor significantly greater than if the ACM were used instead. For most plans, the results produced by the SFM would differ from



those produced by the ACM primarily because of the shift from the ACM's assumed value of benefit accruals (in current § 2610.23(c)(1)) to the SFM's actual value (in proposed § 2610.23(c)(5)). Any such difference for an individual plan would be in the direction of improved accuracy and should thus be unobjectionable.

Aside from the change in accounting for accruals, the PBGC believes that for the vast majority of plans, the results produced by the SFM would not differ significantly from those that would be produced by the ACM. While there would be a relatively small number of plans for which the SFM would produce a significantly higher premium than the ACM, such a plan could avoid paying an unnecessarily high premium by using the general rule.

The other proposed amendments to § 2610.23 reflect technical, clarifying, and conforming changes that are not intended to have any substantive effect.

#### **SFM for Distress or Involuntary Terminations**

Section 2610.24(c) currently contains a special version of the ACM for plans undergoing distress or involuntary termination. Following the same pattern as in § 2610.23, the amendment would move this special ACM rule to the end of § 2610.24 and preserve it (as § 2610.24(h)) for premium payment years beginning after 1988 and before 1993. In its place, a new § 2610.24(c) would provide a special version of the SFM for plans in involuntary or distress terminations. (As in § 2610.23, there would also be a number of technical and conforming changes.)

New § 2610.24(c) would be much like the existing provision, except that it would tie into the SFM rather than the ACM. Aside from the new restriction (discussed above) on use of the SFM by large plans, the plans permitted to use the new special rule would be the same as under the existing rule, and the Schedule B they could use would be determined in the same way as it is now. However, because the SFM would adjust benefits for additional accruals, and UVBs for the passage of time, differently than the ACM does, new § 2610.24(c) (3), (4), and (6), which deal with these adjustments, would be restructured to conform to the new SFM rules. In particular, § 2610.24(c) (3) and (4) would provide different modifications of the SFM rules, depending on whether or not the Schedule B being used included separate entries for active and terminated vested participants' vested benefits and an entry for accruals (features that were added in 1989).

Also, § 2610.24(c)(5) would provide that the new simpler method for adjusting plan assets in proposed § 2610.23(c)(6) could not be used; instead, a method that tracks the current ACM asset adjustment method in existing § 2610.23(c)(4) would be required. This provision is prompted by the difficulty of devising an adaptation of the simple new § 2610.23(c)(6) rule that would appropriately discount contributions that might cover multiple years and that might have been made before the full phase-in of the quarterly contribution requirement in section 302(e) of ERISA and section 412(m) of the Internal Revenue Code of 1986.

#### **Due Dates**

ERISA section 4007 specified a due date of 30 days after the beginning of the premium payment year for premiums for the first premium payment year beginning after ERISA's effective date. The premium regulation retained this due date rule until 1978, when the due date was changed to seven months after the end of the preceding plan year; for 1981 through 1984, the due date was the end of the seventh month of the premium payment year. In 1985, it was changed to the end of the second month of the premium payment year for large plans only, in response to recommendations of the Grace Commission (the President's Private Sector Survey on Cost Control) (see the preambles to the proposed and final 1985 amendment to the premium regulation, 50 FR 1065 at 1066 (January 9, 1985) and 50 FR 12533 at 12534-5 (March 29, 1985)). (For the first year of the new rule, large plans were defined as those with at least 10,000 participants; beginning in 1986, the threshold was dropped to 500 participants.) However, the end of the seventh month was retained in 1985 as the small plan due date.

The PBGC recognized that some large plans might have problems computing their premiums by the new, earlier due date because of difficulty in determining participant counts as of the required determination date (the last day of the prior year). The PBGC therefore made provision for the estimation of early payments, established safe harbor rules to give large plans a means of avoiding penalties on underpayments resulting from low estimates, and established explicit rules in the premium regulation for the reconciliation of estimated early premium payments with the final participant count. The reconciliation date was made the same as the later due date that remained applicable to small plans.

In 1988, the variable rate premium for single-employer plans was introduced. The flat rate premium due date for large plans remained the end of the second month of the premium payment year (e.g., February 28th for calendar year plans); however, the due date for the new variable rate premium was made the same for large plans as for small plans (and the same as the reconciliation date for large plans), and was deferred to the fifteenth day of the eighth month after the beginning of the premium payment year (e.g., September 15th for calendar year plans). (The use of the later due date for large plans' variable rate premiums—an anomaly in the context of the Grace Commission recommendations—reflected concern for plans' ability to make realistic variable rate premium estimates by the early due date, in view particularly of the variable rate premium computation rules prescribed in the regulation, which relied heavily on data developed for the Form 5500 and Schedule B thereto.)

Thus, although the premium regulation does not actually require two annual premium filings by large plans, the due date structure makes filing twice a year a practical necessity for most large plans. This is true for those plans that find it necessary (or administratively convenient) to pay an estimate at the early filing date, which they must later reconcile; and also for those single-employer plans that find it impossible (or administratively inconvenient) to compute the variable rate premium in time to pay it at the same time the flat rate premium is due. The need for two filings each year by most large plans is a burden for them and for the PBGC.

Moreover, a large plan that underestimates its flat rate premium on the early due date must pay interest to the PBGC on the amount of the underpayment, even if it satisfies the safe harbor rules. The safe harbor rules provide protection only from penalties, not from interest charges; the PBGC does not have the authority to waive interest charges. If an estimated payment turns out to be higher than the flat rate amount finally determined to be due, the plan may receive a credit or refund, but the PBGC lacks the authority to pay interest on overpayments.

Furthermore, although the safe harbor rules give large plans an opportunity to avoid penalties on underpayment of the flat rate premium by paying a definitely determinable amount (last year's participant count times the current year's flat rate) and making up any shortfall by the reconciliation due date, the safe harbor rules make the premium regulation more complex by providing a



different rule for penalties than is provided for interest. The safe harbor rules are also an administrative burden for the PBGC, which must treat plans that fail the safe harbor tests differently than those that pass the tests but nonetheless underpay the flat rate premium at the early due date, assessing both interest and penalties against the former but charging the latter for interest only. Where a penalty is assessed, it is based on the full difference between the early payment actually made and the final flat-rate amount due (rather than just the difference between the actual early payment and the safe harbor amount).

Finally, while variable rate premiums are due after the nominal due date for the Form 5500 (and Schedule B), the Form 5500 due date is often extended by two-and-a-half months, making it later than the premium due date. Thus, single-employer plans must often pay variable rate premiums a whole month before they are required to report on Form 5500 the data on which those premiums are based (although of course the data ultimately reported on Form 5500 may be used to determine premiums before the Form 5500 is in fact filed). This discrepancy has been of particular concern for plans using the alternative calculation method, which refers explicitly to Schedule B line items. (The same comment would apply to the simplified filing method that the PBGC proposes to substitute for the existing alternative calculation method.)

The PBGC proposes to address these problems by deferring the final filing due date (to just 15 days before the extended Form 5500 due date), raising the number of participants a plan must have in order to be required to make the early premium payment (so that fewer plans must file twice a year), and charging neither penalties nor interest on early payments that equal at least a definitely determinable amount (so that both estimates and special safe harbor rules are unnecessary). Providing a definite amount for the early payment would also obviate the need for even estimated data determinations before the early payment was made. This would make it possible to accelerate the early filing due date to nearer the beginning of the premium payment year and to widen the scope of the early payment to cover the variable rate, as well as the flat rate, portion of the premium—changes that would balance those described above in order to achieve approximate revenue neutrality for the PBGC.

Structurally, the existing due date rules in § 2610.25 (b), (c), and (d) (and those in § 2610.34 (a) and (b) for

premium payment years of multiemployer plans beginning after 1987) would be consolidated, moved to the end of § 2610.25 (as § 2610.25(e)), and preserved for premium payment years beginning after 1987 and before 1993. (These rules would be significantly reworded to make them consistent in format with the new rules being proposed for premium payment years beginning after 1992, but without the intent to make any substantive changes in the old rules.) Current § 2610.25 (e) and (f) would be redesignated as § 2610.25 (c) and (d). The new due date rules, for premium payment years beginning after 1992, would be set forth in a new § 2610.25(b).

Although the proposed amendment would eliminate prospectively the need for the safe harbor rules (currently in § 2610.8(b)(4)), these rules would need to be preserved for premium payment years beginning before 1993.

Accordingly, the safe harbor rules would be moved to the end of § 2610.8(b) (that is, redesignated as § 2610.8(b)(5)) and reworded slightly to make them applicable only to premium payment years beginning before 1993 and to conform references to other provisions of the amended premium regulation.

Under the current due date rules, the plans that must pay the flat rate premium by the early due date are those that were required to pay premiums for at least 500 participants for the plan year preceding the premium payment year (the current "large plan threshold," which would be preserved in § 2610.25(e)(5)). Under the new rules, the number of plans required to file by the early due date would be reduced by increasing the large plan threshold to 5,000 participants. This would be reflected in the definitions (for purposes of the new due date rules) of the terms "large plan" and "small plan" in proposed § 2610.25(b)(5). For the 1989 premium payment year, there were about 8,000 plans at or above the 500-participant threshold, but only about 1,000 plans that had at least 5,000 participants; thus, the PBGC estimates that the proposed increase in the large plan threshold would reduce by about 7,000 (or 87 percent) the number of plans that would potentially need to make two filings per year.

The amendment would also change both annual due dates (that is, the early date applicable only to the new, smaller group of "large plans" and the later date applicable to the new, larger group of "small plans" and to reconciliation filings by the large plans). Under proposed new § 2610.25(b)(1), the small plan due date would be the last day of

the ninth full calendar month following the end of the plan year preceding the premium payment year (i.e., September 30th for calendar year plans, October 31st for plans with plan years beginning January 2d-February 1st, etc.). Under proposed § 2610.25(b)(2)(ii), this would also be the reconciliation due date for large plans. This is only 15 days before the due date for the Form 5500 with the typical two-and-a-half-month extension. This change would relieve plans of the need to compute premiums a full month before the underlying data have to be reported on Form 5500 and Schedule B thereto.

Under new § 2610.25(b)(2)(i), the early due date for large plans would be advanced to the fifteenth day of the first full calendar month following the end of the plan year preceding the premium payment year (i.e., January 15th for calendar year plans, February 15th for plans with plan years beginning January 2d-February 1st, etc.). If large plans were still to be required to pay their (actual or estimated) flat rate premiums for the premium payment year by the early filing date, advancing the date would worsen the existing problems with early filing. However, as mentioned briefly above and discussed in detail below, the amendment would also provide large plans with a definitely determinable amount to pay at the early filing date, thus making estimation unnecessary. In view of this latter change, there would no longer be any reason not to collect the preliminary payment close to the beginning of the premium payment year. This practice would be more in line with the practices of commercial insurance companies.

New § 2610.25(b)(2)(i) would also prescribe the amount due from large plans on the early filing date. This would be either the dollar amount of the total (flat and variable rate) premium payable for the plan year preceding the premium payment year—a definitely determinable amount that would be known well in advance of the early due date—or, at the plan's option, the total (flat and variable rate) premium due for the premium payment year (which the plan could estimate if it chose). If the early payment fell short of the total premium finally determined to be payable for the premium payment year, the amount of the shortfall would be due by the reconciliation due date under new § 2610.25(b)(2)(ii).

It should be noted that under this proposal, the scope of the early payment for large plans would not be limited to the flat rate portion of the premium, as it has been up to now. As mentioned above, problems with estimating the



variable rate premium militated against including it in the initial payment when it was introduced in 1988. Since estimating would no longer be required under this proposal, however, the PBGC sees no reason to continue deferring large plans' variable rate payments to a date close to the end of the premium payment year.

It should also be noted that the proposed early payment would be based on the dollar amount of the previous year's premium, rather than on the previous year's plan data and the current year's premium rates, as under the existing regulation's safe harbor rules. The proposed approach has been taken in the interest of simplicity, even though it would mean that the PBGC would lose the benefit of any future premium rate increases in the initial premium filing.

A third point to note is that in determining the amount of the previous year's premium, refunds and credits under existing § 2610.22(d) and proposed new § 2610.22(e) would be disregarded. Thus, the early payment obligation would not be artificially reduced by the circumstance that the preceding plan year was a short year.

The key feature of the proposed new early payment requirement, however, would be the elimination of the need to estimate, and with it the need for special safe harbor rules and the risk of interest charges. Currently, safe harbor rules are needed to relieve plans from penalties that would otherwise accrue for even small, good faith underestimates of their flat rate premiums at the early filing date. But even the safe harbor rules provide no relief from interest charges on underestimates. Under the proposal, a plan that paid the same amount as the previous year's final total premium by the early filing date would be assured of avoiding not only penalties (as under the existing safe harbor rules) but also interest on any amount by which the early payment fell short of the final total premium.

However, the proposal would still allow a plan to pay an estimate of the current year's premium at the early filing date if it so chose. Choosing to pay an estimate would open the plan to the risk of interest and penalty charges if the estimate proved to be too low, but a plan would presumably accept this risk if it believed that its current year's premium would end up being substantially less than its previous year's premium (as, for example, if it had lost many of its participants or had substantially improved its funding during the preceding year).

Upon reconciliation, a plan would owe the amount (if any) by which its

early payment was less than the premium finally determined to be due. However, no penalty or interest on the amount of the shortfall would be owed as long as the early payment were at least equal to the previous year's premium. If the early payment were less than both the previous year's final amount and the current year's final amount, interest and penalty would be imposed only on the amount by which the early payment fell short of the lesser of the previous year's final premium or the current year's final premium. (If the early payment were more than the current year's final amount, a refund or credit would be available under the same rules applicable to overpayments generally.)

For example, suppose that a plan's final total premium obligation for 1995 were \$1,000 and that the plan made an early premium payment (using an estimate) of \$700 for 1996. If its final 1996 premium were \$1,200, it would owe penalty and interest only on \$300, the amount by which its early payment fell short of \$1,000 (the lesser of 1995's or 1996's final premium obligation). But if its final 1996 premium were \$900, it would owe interest and penalty only on \$200, the shortfall from \$900 (again, the lesser of the 1995 or the 1996 final premium). Of course, if the plan made an early payment of \$1,000, it would owe no penalty or interest no matter how large its final 1996 obligation turned out to be.

The PBGC now permits large plans to file a Form 1 instead of a Form 1-ES at the early filing date; single-employer plans are allowed to file this early Form 1 without a Schedule A. This practice is consistent with the fact that the early payment under the current rules is an estimate of only the flat rate portion of the final premium. By filing Form 1 early without Schedule A, therefore, a plan is simply substituting a final flat rate figure for an estimate of the same figure. Under the proposed system, however, the early payment would be keyed to the total premium liability (either the previous year's figure or an estimate of the current year's). Thus, the PBGC would continue to accept advance filing of a final premium payment (either instead of the early payment or after the early payment was made) only if the advance filing were a complete final filing, including (in the case of a single-employer plan) Schedule A and payment of both the flat and variable rate premiums.

The proposed due date rules for new and newly covered plans (in new § 2610.25(b)(3)) would be the same as the existing rules for such plans (which would be preserved in § 2610.25(e)(3)). The proposed due date rules for plans

changing plan years (in new § 2610.25(b)(4)) would be almost the same as the corresponding rules in the existing regulation (which would be preserved in § 2610.25(e)(4)), except that a plan would have at least 90 days, instead of the 30 days now allowed, to pay its premium after adopting the amendment changing the plan year. The purpose of this change would be simply to make the filing rule for plans that change plan years more consistent with the rule for new and newly covered plans (which permits filing 90 days after plan adoption or the beginning of title IV coverage), and thus remove a potential source of confusion.

As alluded to briefly above, the new due date provisions would embody a combination of changes (some representing financial losses for the PBGC and others representing financial gains) that the PBGC has designed to have no substantial net revenue effect for the PBGC. Obviously, however, the new rules would shift financial burdens among premium payers to some degree, primarily away from smaller "large plans" that would no longer be required to pay premiums by the early due date and toward larger "large plans" that would be required to pay more of their premiums by an earlier due date. (The policy of requiring earlier payment from larger plans than from smaller plans was discussed in the preamble to the final 1985 amendment to the premium regulation, 50 FR 12533 at 12535 (March 29, 1985).)

In the process of devising the new premium payment system embodied in the proposed changes to the due date rules in § 2610.25, the PBGC considered and rejected several alternative approaches to the premium payment problems discussed above. For example, the early payment required of large plans might have remained limited to the flat rate portion of the premium only. However, the proposal's substantial reduction in the number of plans required to make the early filing would not then have been possible without significant revenue loss to the PBGC. Another possibility would have been to base the early payment required of large plans on the amount of the previous year's premium only, without the option of paying an estimate. However, the lack of an estimation option might have created problems for plans that underwent very substantial contraction (as through spinoff of most of their participants) or substantially improved their funding during the year preceding the premium payment year.

Another approach (the "maximum simplicity" approach) would have



returned to the pre-Grace Commission practice of having all plans pay their premiums on the same schedule, with the due date for all plans deferred to the Form 5500 due date. This approach would have solved all the due date problems discussed above. However, it would have entailed an unacceptable loss of revenue to the PBGC, due to the deferral of premium receipts from large plans.

A third approach (the "legislative change" approach) would have sought a statutory amendment moving the premium determination date back one year, from the last day of the plan year preceding the premium payment year to the last day of the plan year *before* the plan year preceding the premium payment year. The premium due date would then have been accelerated to the beginning of the premium payment year for all plans.

Since the extended due date of the applicable Form 5500 would have fallen in the tenth month of the preceding plan year, this approach would have avoided the need to pay premiums before the relevant data had to be filed on Form 5500. It would also have eliminated estimated premium payments and reconciliation by making the early payment the only payment. However, it would have involved a substantial additional cost for small plans, which currently pay relatively late in the premium payment year.

Also, the use of older determination data would have made premiums lag behind changes in participant counts and funding levels. This would have tended to favor plans with increasing participant counts and single-employer plans with deteriorating funding levels by making their premiums lower than under the current system. But plans with declining participant counts and single-employer plans with improving funding levels would have been disadvantaged because their premiums would have been higher than under the current system.

In addition, creating a one-year gap between the premium determination date and the beginning of the premium payment year would have created significant complexities regarding the premium obligations of plans involved in mergers, consolidations and spinoffs during the period between the earlier determination date and the beginning of the premium payment year.

A fourth approach (the "combined filing" approach) would also have called for all plans to pay premiums just once a year, at the beginning of each premium payment year. The payment would have been a combination of two components. One component would have been a

reconciliation for the prior year, based on the Form 5500 data filed during the prior year for the year preceding the prior year. The second component would have been a preliminary payment for the current year equal to the prior year's total premium. If the reconciliation involved an additional payment, it would have been added to the preliminary premium for the current year, without any penalties or interest. If the reconciliation generated a credit, it would have been subtracted from the preliminary payment for the current year.

As with the legislative change approach, the applicable Form 5500 due date under the combined filing approach would have been well before the premium due date when the Form 5500 data would be needed. Estimates would also have been avoided, and although there would have been reconciliation filings, they would have been combined with the preliminary premium filings so that plans would not have had to file twice a year. But accelerating most of the premium to the beginning of the year would have meant increased costs for plans, particularly for small plans.

Furthermore, plans with declining participant counts and single-employer plans with improving funding would have been disadvantaged under the combined filing approach in much the same way as under the legislative change approach because, although the preliminary payment would eventually have been reconciled, the reconciliation date would have been a whole year after the preliminary payment. (A plan would have been allowed to reconcile earlier only if it also paid the preliminary premium for the following year at the same time.)

A fifth approach (the "two-system" approach) would have combined the maximum simplicity approach for small plans with the combined filing approach for large plans, giving the advantages of both approaches. However, large plans with declining participant counts and large single-employer plans with improving funding would have had the same kinds of problems as under the combined filing approach. In addition, the difference in payment rules for large and small plans would have been great enough so that different forms and instructions for large and small plans might have been needed.

#### Compliance With Rulemaking Guidelines

The PBGC has determined that this amendment is not a "major rule" for purposes of Executive Order 12291 (46 FR 13193 (February 17, 1981)) because it will not have an annual effect on the

economy of \$100 million or more; or create a major increase in costs or prices for consumers, individual industries, or geographic regions; or have significant adverse effects on competition, employment, investment, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This determination is based on the fact that this amendment would have no significant effect on the overall financial burden of PBGC premiums on plans in general, but rather would only shift those burdens to a limited extent among classes of plans, primarily away from smaller plans and toward larger plans (especially larger underfunded plans); and on the fact that this amendment would tend to decrease the non-financial burden of paying PBGC premiums by making the premium payment process simpler.

Under section 605(b) of the Regulatory Flexibility Act, the PBGC certifies that this amendment will not have a significant economic impact on a substantial number of small entities. The amendment will tend to shift the financial burden of PBGC premiums away from smaller plans and toward larger plans (especially larger underfunded plans), and will tend to decrease the non-financial burden of paying PBGC premiums by making the premium payment process simpler. For these reasons, compliance with sections 603 and 604 of the Regulatory Flexibility Act is waived.

#### List of Subjects in 29 CFR Part 2610

Employee benefit plans, Penalties, Pension insurance, Pensions, and Reporting and recordkeeping requirements.

In consideration of the foregoing, the PBGC proposes to amend part 2610 of subchapter H of chapter XXVI of title 29, Code of Federal Regulations, as follows:

#### PART 2610—PAYMENT OF PREMIUMS

1. The authority citation for part 2610 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1308, 1307 (1988 & Supp. I 1989), as amended by sec. 12021, Public Law 101-508, 104 Stat. 1388, 1388-573.

2. In § 2610.1, the second sentence and the last three sentences of paragraph (a) are revised to read as follows:

##### § 2610.1 Purpose and scope.

(a) *Purpose.* \* \* \* Subpart A contains rules that apply to both single-employer and multiemployer plans with respect to all premium payment years. \* \* \*



Subpart B contains the premium rates, due dates and computational rules for premium payment years beginning after 1987. Subpart C contains the premium rates and due dates for premium payment years beginning before 1988.

3. Section 2610.2 is revised to read as follows:

**§ 2610.2 Definitions.**

(a) *In general.* For purposes of this part:

*Act* means the Employee Retirement Income Security Act of 1974, as amended.

*Code* means the Internal Revenue Code of 1986, as amended.

*Form 5500* means the Form 5500 series annual report prescribed by the Internal Revenue Service, the Department of Labor and the PBGC.

*Multiemployer plan* means a plan described in section 4001(a)(3) of the Act.

*New plan* means a plan that became effective within the premium payment year and includes a plan resulting from a consolidation or spinoff. A plan that meets this definition is considered to be a new plan for purposes of this part even if the plan constitutes a successor plan within the meaning of section 4021(a) of the Act.

*Newly covered plan* means a plan that is not a new plan and that was not covered by title IV of the Act pursuant to section 4021 of the Act immediately before the premium payment year.

*PBGC* means the Pension Benefit Guaranty Corporation.

*Plan year* means the calendar, policy or fiscal year on which the records of the plan are kept.

*Premium payment year* means the plan year for which the premium is being paid.

*Short plan year* means a plan year that is less than twelve full months.

*Single-employer plan* means a plan described in section 4001(a)(15) of the Act.

(b) *"Participant" for premium payment years beginning after 1992.* For purposes of this part, for a premium payment year beginning after 1992, "participant" means the same as it does for purposes of the Form 5500 for the plan year preceding the premium payment year (or, in the case of a new plan, or a newly covered plan that was not required to file Form 5500 for the plan year preceding the premium payment year, the Form 5500 prescribed for plan years beginning one year before the first day of the plan's first premium payment year).

(c) *"Participant" for premium payment years beginning before 1993.*

For purposes of this part, for a premium payment year beginning before 1993, "participant" means any individual who is included in one of the categories described in paragraphs (c)(1)–(c)(3) of this section, subject to the provisions of paragraph (c)(4) of this section.

(1) *Active.* (i) Any individual who is currently in employment covered by the plan and who is earning or retaining credited service under the plan. This category includes any individual who is considered covered under the plan for purposes of meeting the minimum coverage requirements, but who, because of offset or other provisions (including integration with Social Security benefits), does not have any accrued benefits.

(ii) Any non-vested individual who is not currently in employment covered by the plan but who is earning or retaining credited service under the plan. This category does not include a non-vested former employee who has incurred a break in service the greater of one year or the break in service period specified in the plan.

(2) *Inactive—(i) Inactive receiving benefits.* Any individual who is retired or separated from employment covered by the plan and who is receiving benefits under the plan. This category does not include an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(ii) *Inactive entitled to future benefits.* Any individual who is retired or separated from employment covered by the plan and who is entitled to begin receiving benefits under the plan in the future. This category does not include an individual to whom an insurer has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(3) *Deceased.* Any deceased individual who has one or more beneficiaries who are receiving or entitled to receive benefits under the plan. This category does not include an individual if an insurer has made an irrevocable commitment to pay all the benefits to which the beneficiaries of that individual are entitled under the plan.

(4) For plan years beginning before September 2, 1975, a retiree or former employee for whom a fully paid-up immediate or deferred annuity has been purchased shall be treated as a "participant" for purposes of this part if such individual retains a legal claim against the plan for benefits or if the plan retains a participating interest in the annuity policy.

4. Section 2610.4 is revised to read as follows:

**§ 2610.4 Filing address.**

Except as may otherwise be provided by instructions in the PBGC Annual Premium Payment Package, any form or payment required to be filed or paid under the provisions of this part shall be mailed to Pension Benefit Guaranty Corporation, P.O. Box 105655, Atlanta, GA 30348-5655, or delivered to NationsBank Retail Lockbox Processing Center, PBGC Lockbox 105655, 6000 Feldwood Road, 5 Southside East, College Park, GA 30349.

5. Section 2610.5 is revised to read as follows:

**§ 2610.5 Date of filing.**

(a) *Premium payment years beginning after 1992.* (1) Any form or payment required to be filed or paid under the provisions of this part with respect to a premium payment year beginning after 1992 shall be deemed filed or paid on the earlier of—

(i) The date on which it is mailed, as evidenced by a legible United States Postal Service postmark, registered mail receipt, or other proof of the date of mailing with the United States Postal Service, or

(ii) Five days before the date on which it is received by the PBGC.

(2) For purposes of this section, if the PBGC receives a form or payment on the first business day following a weekend or a federal holiday, then the PBGC shall be deemed to have received the form or payment on the day after the last business day preceding the weekend or holiday. The term *business day* as used in this section means any day that is not a Saturday, a Sunday, or a federal holiday.

(b) *Premium payment years beginning before 1993.* (1) Any form or payment required to be filed or paid under the provisions of this part with respect to a premium payment year beginning before 1993 shall be deemed filed or paid on the date on which it is mailed.

(2) For purposes of this paragraph (b), a form or payment shall be presumed to have been mailed on the date on which it is postmarked by the United States Postal Service, or three days prior to the date on which it is received by the PBGC if it does not contain a legible United States Postal Service postmark.

6. In § 2610.8, paragraphs (b)(4) and (b)(5) are revised to read as follows:

**§ 2610.8 Late payment penalty charges.**

\* \* \* \* \*

(b) *Waiver of penalty charge.* \* \* \*



(4) With respect to the period of 30 days after the date of any PBGC bill for the premium payment necessary to reconcile the premium paid with the actual premium due, if the bill is paid within that 30-day period; or

(5) With respect to any premium payment (excluding any variable rate portion of the premium under § 2610.22(a)(2)) for a premium payment year beginning before 1993, if a plan that is required to make a reconciliation filing described in § 2610.25(e)(2)(iii) or § 2610.34(b)—

(i) paid at least 90 percent of the flat rate portion of the premium due for the premium payment year by the due date specified in § 2610.25(e)(2)(i) or § 2610.34(a); or

(ii) paid by the due date specified in § 2610.25(e)(2)(i) or § 2610.34(a) an amount equal to the premium that would be due for the premium payment year, computed using the flat per capita premium rate for the premium payment year and the participant count upon which the prior year's premium was based; and

(iii) pays 100 percent of the premium due for the premium payment year under § 2610.22 (excluding any variable rate portion of the premium under § 2610.22(a)(2)), § 2610.32, or § 2610.33, as applicable, on or before the due date for the reconciliation filing under § 2610.25(e)(2)(iii) or § 2610.34(b), as applicable.

7. Section 2610.21 is revised to read as follows:

#### § 2610.21 Purpose and scope.

This subpart provides rules for computing and procedures for paying premiums for plan years beginning after 1987.

8. In § 2610.22, paragraph (a) is amended by revising its heading; paragraphs (a)(3) introductory text and (a)(3)(i)–(a)(3)(v) are redesignated as paragraphs (f) introductory text and (f)(1)–(f)(5) respectively; redesignated paragraphs (f) introductory text and (f)(5) are amended by revising the references “(a)(3)”, “(a)(3)(i)”, “(a)(3)(ii)”, “(a)(3)(iii)”, “(a)(3)(iv)”, and “(a)(3)(v)” (wherever they appear) to read “(f)”, “(f)(1)”, “(f)(2)”, “(f)(3)”, “(f)(4)”, and “(f)(5)” respectively; paragraph (c) is removed; paragraph (b) is redesignated as paragraph (c); redesignated paragraph (c) is amended by revising the reference “paragraph (a)” to read “paragraphs (a) and (b)”; redesignated paragraph (f) is amended by revising its heading and by removing the first sentence of its introductory text; paragraph (d) is revised; and new paragraphs (a)(3), (b), and (e) are added, to read as follows:

#### § 2610.22 Premium rates.

(a) *Single-employer plans.* \* \* \*

(3) *Cap on variable rate amount.* In no event shall the variable rate amount determined under paragraph (a)(2) of this section exceed \$34 per participant (for premium payment years beginning in 1988, 1989, or 1990) or \$53 per participant (for premium payment years beginning after 1990), or (for premium payment years beginning before 1993) such lesser amount as may be determined under paragraph (f) of this section.

(b) *Multiemployer plans.* For a premium payment year beginning on or after January 1, 1988, the premium paid by a multiemployer plan for basic benefits guaranteed under section 4022A(a) of the Act is equal to the number of participants in the plan on the last day of the plan year preceding the premium payment year multiplied by:

(1) For premium payment years beginning before September 27, 1988, \$2.20; and

(2) For premium payment years beginning after September 26, 1988, \$2.60.

\* \* \* \* \*

(d) *Special refund rule for certain short plan years.* A plan described in this paragraph that pays the full premium due for a short plan year that begins after 1988 is entitled, upon request, to a refund of a portion of the premium. The amount of the refund will be determined by prorating the premium for the short plan year by the number of months (treating a part of a month as a month) in the short plan year. A plan is described in this paragraph if—

(1) the plan is a new or newly covered plan that becomes effective for premium purposes on a date other than the first day of its first plan year;

(2) the plan adopts an amendment changing its plan year, resulting in a short plan year;

(3) the plan's assets are distributed pursuant to the plan's termination, in which case the short plan year for purposes of computing the amount of the refund under this paragraph shall be deemed to end on the asset distribution date or, if later (in the case of a single-employer plan), the date 30 days before the PBGC receives the plan's post-distribution certification; or

(4) the plan is a single-employer plan, and a trustee of the plan is appointed pursuant to section 4042 of the Act, in which case the short plan year for purposes of computing the amount of the refund under this paragraph shall be deemed to end on the date of appointment.

(e) *Special credit rule for certain short plan years.* A plan described in paragraph (d)(1) or (d)(2) of this section is entitled at its option to a credit for a portion of the premium for a short plan year, in lieu of a refund under paragraph (d) of this section, under the circumstances described in this paragraph (e). A plan described in paragraph (d)(1) of this section may claim the credit against the premium due for an initial short plan year that begins after 1992. A plan described in paragraph (d)(2) of this section that pays the full premium due for a short plan year may claim the credit for the short plan year against the premium due for the following full plan year if the full plan year begins after 1992. In either case, the amount of the credit shall be determined in the same manner as the amount of a refund under paragraph (d) of this section, and the credit shall be claimed in accordance with instructions in the PBGC Annual Premium Payment Package.

(f) *Variable rate cap reduction for premium payment years beginning before 1993.*

\* \* \* \* \*

9. In § 2610.23, paragraph (a) is amended by adding, after the reference “paragraph (c)” in the first sentence of the introductory text, the reference “or (f)”; paragraph (c) is redesignated as paragraph (f); paragraph (e) is amended by adding, after the reference “paragraphs (a) through (d)”, the reference “and (f)”; redesignated paragraph (f) is amended by revising the references “(c)(1)”, “(c)(2)”, “(c)(3)”, “(c)(4)”, and “(c)(5)” (wherever they appear) to read “(f)(1)”, “(f)(2)”, “(f)(3)”, “(f)(4)”, and “(f)(5)” respectively; paragraph (b)(2) is amended by revising the second, third and fourth sentences; paragraph (d) is amended by revising the heading and introductory text; redesignated paragraph (f) is amended by revising the heading and the first sentence of the introductory text; and paragraph (c) is added, to read as follows:

#### § 2610.23 Determination of unfunded vested benefits.

\* \* \* \* \*

(b) *Unfunded vested benefits.* \* \* \*

(2) *Actuarial value of assets.* \* \* \*

Contributions owed for any plan year preceding the premium payment year shall be included for premium payment years beginning during 1988 and, for premium payment years beginning after 1988, shall be included for plans with 500 or more participants as of the last day of the plan year preceding the premium payment year and may be



included for any other plan. However, contributions may be included only to the extent such contributions have been paid into the plan on or before the earlier of the due date specified in § 2610.25 (b)(1), (b)(2)(ii), (e)(1), or (e)(2)(ii) (as applicable) or the date that the full amount of the premium (including any variable rate portion) is paid. Contributions included that are paid after the last day of the plan year preceding the premium payment year shall be discounted at the plan asset valuation rate (on a simple or compound basis in accordance with the plan's discounting rules) to the last day of the plan year preceding the premium payment year to reflect the date(s) of payment. \* \* \*

(c) *Simplified filing method for premium payment years after 1992—(1) In general.* In lieu of determining the amount of a plan's unfunded vested benefits pursuant to paragraph (a) of this section for a premium payment year beginning after 1992, the plan administrator may, subject to the restrictions in paragraphs (c)(1)(i) and (c)(1)(ii) of this section, calculate the amount of the plan's unfunded vested benefits under this paragraph (c). The computation shall be done, using the plan's Form 5500 Schedule B for the plan year preceding the premium payment year, as follows. The value of the plan's vested benefits shall be adjusted in accordance with paragraphs (c)(2) through (c)(5) of this section to reflect accruals for the plan year preceding the premium payment year and the difference between the interest rate prescribed in paragraph (b)(1) of this section and the plan's current liability

interest rate or rates. The value of plan assets shall be adjusted in accordance with paragraph (c)(6) of this section to reflect contributions for the plan year preceding the premium payment year. The resulting unfunded vested benefits amount (the adjusted value of vested benefits minus the adjusted value of assets) shall be further adjusted in accordance with paragraph (c)(7) of this section to reflect the passage of time from the date of the adjusted Schedule B data (the first day of the plan year preceding the premium payment year) to the last day of the plan year preceding the premium payment year. (An alternative calculation method for premium payment years beginning before 1993 is described in paragraph (f) of this section.)

(i) A plan's unfunded vested benefits may be calculated under this paragraph (c) only if neither of the plan's current liability interest rates required to be entered in line 12c(i) of the plan's Form 5500 Schedule B for the plan year preceding the premium payment year exceeds the interest rate prescribed in paragraph (b)(1) of this section by more than six percentage points.

(ii) The unfunded vested benefits of a plan with 500 or more participants as of the last day of the plan year preceding the premium payment year may be calculated under this paragraph (c) only in accordance with the provisions of paragraph (d) of this section, and only if the amount of the plan's unfunded vested benefits determined pursuant to paragraph (a) of this section does not exceed the amount of such unfunded vested benefits calculated under this paragraph (c) and an enrolled actuary so

certifies in accordance with the Premium Payment Package.

(2) *Vested benefits adjustment factors.* In the simplified filing method described in this paragraph (c), the vested benefits values required to be entered in item 6d of Schedule B shall be adjusted in accordance with paragraphs (c)(3), (c)(4), and (c)(5) of this section using factors from the tables set forth in this paragraph (c)(2), and the sum of the three vested benefits values as so adjusted shall be used in determining unfunded vested benefits under paragraph (c)(7) of this section. For each adjustment, a Table 1 factor shall be used if the required interest rate prescribed in paragraph (b)(1) of this section (the "Premium Interest Rate") is less than the applicable current liability interest rate specified in paragraph (c)(3), (c)(4), or (c)(5) of this section (the "Funding Interest Rate"), and a Table 2 factor shall be used if the Premium Interest Rate equals or exceeds the applicable Funding Interest Rate. The factor for each adjustment shall be taken from the line in the appropriate table on which appears, in column A, the range of values that includes the amount (expressed as a percentage, rounded to the nearest hundredth of one percent) by which the Premium Interest Rate differs from the applicable Funding Interest Rate, and from the column specified in paragraph (c)(3), (c)(4), or (c)(5) of this section (based, in the case of paragraphs (c)(4) and (c)(5) of this section, on the assumed retirement age required to be entered in line 12d of Schedule B).

TABLE 1

[To be used when the Premium Interest Rate is less than the Funding Interest Rate]

Column A		Column B	Column C			
If the Funding Interest Rate minus the Premium Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
			for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
at least	but not over					
0.01	0.25	1.02	1.04	1.04	1.05	1.05
.26	.50	1.03	1.08	1.09	1.10	1.11
.51	.75	1.05	1.12	1.13	1.15	1.16
.76	1.00	1.06	1.16	1.18	1.20	1.22
1.01	1.25	1.08	1.20	1.23	1.26	1.29
1.26	1.50	1.10	1.24	1.28	1.31	1.35
1.51	1.75	1.11	1.29	1.33	1.38	1.42
1.76	2.00	1.13	1.34	1.39	1.44	1.49
2.01	2.25	1.15	1.39	1.45	1.51	1.57
2.26	2.50	1.17	1.44	1.50	1.58	1.65
2.51	2.75	1.19	1.49	1.57	1.65	1.73
2.76	3.00	1.20	1.54	1.63	1.72	1.82
3.01	3.25	1.22	1.60	1.70	1.80	1.92
3.26	3.50	1.24	1.66	1.77	1.89	2.01
3.51	3.75	1.26	1.72	1.84	1.97	2.11
3.76	4.00	1.28	1.78	1.92	2.06	2.22
4.01	4.25	1.30	1.85	2.00	2.16	2.33
4.26	4.50	1.32	1.91	2.08	2.26	2.45



TABLE 1—Continued

[To be used when the Premium Interest Rate is less than the Funding Interest Rate]

Column A		Column B	Column C			
If the Funding Interest Rate minus the Premium Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
4.51	4.75	1.34	1.96	2.16	2.36	2.57
4.76	5.00	1.36	2.06	2.25	2.47	2.70
5.01	5.25	1.38	2.13	2.34	2.58	2.84
5.26	5.50	1.41	2.21	2.44	2.70	2.98
5.51	5.75	1.43	2.29	2.54	2.82	3.13
5.76	6.00	1.45	2.37	2.64	2.95	3.29

TABLE 2

[To be used when the Premium Interest Rate equals or exceeds the Funding Interest Rate]

Column A		Column B	Column C			
If the Premium Interest Rate minus the Funding Interest Rate (to the nearest hundredth of a percent) is—		The factor for pay-status benefits is—	The factor for pre-pay-status benefits (based on the plan's assumed retirement age) is—			
at least	but not over		for ages under 60	for ages 60–61	for ages 62–63	for ages over 63
0.00	0.25	1.00	1.00	1.00	1.00	1.00
.26	.50	.98	.97	.96	.96	.95
.51	.75	.97	.95	.92	.91	.91
.76	1.00	.95	.92	.89	.88	.86
1.01	1.25	.94	.90	.85	.84	.82
1.26	1.50	.92	.87	.82	.80	.78
1.51	1.75	.91	.85	.79	.77	.75
1.76	2.00	.90	.83	.76	.73	.71
2.01	2.25	.88	.80	.73	.70	.68
2.26	2.50	.87	.78	.70	.67	.64
2.51	2.75	.86	.76	.68	.64	.61
2.76	3.00	.84	.74	.65	.62	.58
3.01	3.25	.83	.72	.62	.59	.56
3.26	3.50	.83	.70	.60	.56	.53
3.51	3.75	.80	.68	.58	.54	.50
3.76	4.00	.79	.66	.55	.52	.48
4.01	4.25	.78	.64	.53	.49	.46
4.26	4.50	.77	.63	.51	.47	.44
4.51	4.75	.76	.61	.49	.45	.41
4.76	5.00	.74	.59	.47	.43	.39
5.01	5.25	.73	.58	.45	.41	.37
5.26	5.50	.72	.56	.44	.39	.36
5.51	5.75	.71	.55	.42	.38	.34
> 5.75	> 5.75	.70	.53	.40	.36	.32

(3) *Adjusted value of vested benefits—retirees and beneficiaries.* In the simplified filing method described in this paragraph (c), the adjusted value of vested benefits for retirees and beneficiaries shall be the value of such benefits required to be entered in column (2) on line 6d(i) of Schedule B, multiplied by the appropriate factor determined under paragraph (c)(2) of this section. The factor shall be determined using the Funding Interest Rate required to be entered in the post-retirement column on line 12c(i) of Schedule B and shall be taken from column B of the appropriate table in paragraph (c)(2) of this section.

(4) *Adjusted value of vested benefits—terminated vested participants.* In the simplified filing

method described in this paragraph (c), the adjusted value of vested benefits for terminated vested participants shall be the value of such benefits required to be entered in column (2) on line 6d(ii) of Schedule B, multiplied by the appropriate factor determined under paragraph (c)(2) of this section. The factor shall be determined using the greater of the Funding Interest Rates required to be entered in the pre-retirement and post-retirement columns on line 12c(i) of Schedule B and shall be taken from column C of the appropriate table in paragraph (c)(2) of this section and from the subcolumn of column C that is headed by the age range that includes the plan's assumed retirement age.

(5) *Adjusted value of vested benefits—active participants.* In the simplified filing method described in this paragraph (c), the adjusted value of vested benefits for active participants shall be the sum of the value of such benefits required to be entered in column (2) on line 6d(iii) of Schedule B and the expected accruals for the plan year preceding the premium payment year required to be entered on line 6e of Schedule B, multiplied by the appropriate factor determined under paragraph (c)(2) of this section. The factor shall be determined using the same Funding Interest Rate, and shall be taken from the same column and subcolumn, as specified for terminated vested participants' benefits under paragraph (c)(4) of this section.



(6) *Adjusted value of plan assets.* In the simplified filing method described in this paragraph (c), the adjusted value of plan assets that shall be used in determining unfunded vested benefits under paragraph (c)(7) of this section shall be the sum of—

(i) the value of such assets required to be entered on line 8b of Schedule B (if the amount on line 8b was determined as of the first day of the plan year preceding the premium payment year) or on line 8c of Schedule B (if the amount on line 8b was determined as of a date other than the first day of the plan year preceding the premium payment year), plus

(ii) an amount equal to 0.95 times the total amount of contributions required to be entered in columns (b) and (c) of item 7 of Schedule B.

(7) *Adjusted value of unfunded vested benefits.* In the simplified filing method described in this paragraph (c), the amount of the plan's unfunded vested benefits shall be the product of—

(i) the sum of the adjusted values of vested benefits determined under paragraphs (c)(3), (c)(4), and (c)(5) of this section minus the adjusted value of plan assets determined under paragraph (c)(6) of this section, multiplied by

(ii) the sum of 1 plus the required interest rate prescribed in paragraph (b)(1) of this section (expressed as a decimal fraction of 1, not as a percentage).

(d) *Significant events.* The significant events described in this paragraph shall be reflected in the assumptions used in determining a plan's unfunded vested benefits under paragraph (a) of this section to the extent required by paragraph (a) of this section. A plan with 500 or more participants as of the last day of the plan year preceding the premium payment year may use the simplified filing method described in paragraph (c) of this section or the alternative calculation method described in paragraph (f) of this section if no significant event, as described in this paragraph, has occurred between the first day and the last day of the plan year preceding the premium payment year and an enrolled actuary so certifies in accordance with the Premium Payment Package. If a significant event has occurred between those dates, such a plan may use the simplified filing method or alternative calculation method only if an enrolled actuary makes an appropriate adjustment to the value of unfunded vested benefits to reflect the occurrence of the significant event and certifies to that fact in accordance with the Premium Payment

Package. The significant events described in this paragraph are—

(f) *Alternative calculation method for premium payment years before 1993.* In lieu of determining the amount of a plan's unfunded vested benefits pursuant to paragraph (a) of this section for a premium payment year beginning before 1993, the plan administrator may calculate the amount of the plan's unfunded vested benefits under this paragraph (f) using the plan's Form 5500, Schedule B, for the plan year preceding the premium payment year. \* \* \*

10. In § 2610.24, paragraph (c) is redesignated as paragraph (h); paragraph (d) is amended by revising the reference “§ 2610.22(a)(3)” to read “§ 2610.22(f)”; paragraph (g) is amended by revising the reference “(e)(1) and (e)(2)” to read “(f)(1) and (f)(2)”; redesignated paragraph (h) is amended by adding, after the words “unfunded vested benefits” in the heading, the words “for premium payment years beginning before 1993” and by revising the words “on or after January 1, 1989” in the first sentence of the introductory text to read “after 1988 and before 1993”; redesignated paragraphs (h) introductory text, (h)(2), (h)(3), and (h)(4) are amended by revising the references “§ 2610.23(c)”, “§ 2610.23(c)(1)”, and “§ 2610.23(c)(5)” (wherever they appear) to read “§ 2610.23(f)”, “§ 2610.23(f)(1)”, and “§ 2610.23(f)(5)”, respectively; paragraph (a)(3) is revised; and new paragraph (c) is added, to read as follows:

**§ 2610.24 Variable rate exemptions and special rules.**

(a) *Exemptions.* \* \* \*

(3) *Section 412(i) plans.* A plan is described in this paragraph if the plan satisfied all criteria listed in section 412(i) of the Code and the regulations thereunder on the last day of the plan year preceding the premium payment year and the plan administrator so certifies, in accordance with the Premium Payment Package.

(c) *Special rule for determining unfunded vested benefits for premium payment years beginning after 1992 for plans terminating in distress or involuntary terminations.* With respect to premium payment years beginning after 1992, a plan described in this paragraph (c) may determine its unfunded vested benefits by using the special simplified filing method set forth in this paragraph, but only if neither of the plan's current liability interest rates required to be entered in line 12c(i) of

the Schedule B described in paragraph (c)(1) of this section exceeds the interest rate prescribed in § 2610.23(b)(1) by more than six percentage points; and, in the case of a plan with 500 or more participants as of the last day of the plan year preceding the premium payment year, only in accordance with the provisions of § 2610.23(d), and only if the amount of the plan's unfunded vested benefits determined pursuant to § 2610.23(a) does not exceed the amount of such unfunded vested benefits determined under this paragraph (c) and an enrolled actuary so certifies in accordance with the Premium Payment Package. (A similar special rule for premium payment years beginning before 1993 is described in paragraph (h) of this section.) A plan is described in this paragraph if it has issued notices of intent to terminate in a distress termination in accordance with section 4041(a)(2) of the Act with a proposed termination date on or before the last day of the plan year preceding the premium payment year, or if the PBGC has instituted proceedings to terminate the plan in accordance with section 4042 of the Act and has sought a termination date on or before the last day of the plan year preceding the premium payment year. Pursuant to this paragraph, a plan shall determine its unfunded vested benefits in accordance with the simplified filing method in § 2610.23(c), except that—

(1) The calculation shall be based on the plan's Form 5500 Schedule B for the plan year that includes (in the case of a distress termination) the proposed termination date or (in the case of an involuntary termination) the termination date sought by the PBGC, or, if no Schedule B is filed for that plan year, on the Schedule B for the immediately preceding plan year;

(2) All references in § 2610.23(c) and § 2610.23(d) to the first day of the plan year preceding the premium payment year shall be deemed to refer to the first day of the plan year for which the Schedule B was filed;

(3) If the Schedule B described in paragraph (c)(1) of this section is for a plan year beginning after 1988, then § 2610.23(c)(5) shall be applied by using, instead of the amount required to be entered on line 6e of Schedule B, an amount equal to the product of—

(i) The amount required to be entered on line 6e of Schedule B, multiplied by

(ii) the number of years (rounded to the nearest hundredth of a year) between the date of the Schedule B data and (in the case of a distress termination) the proposed termination date or (in the case of an involuntary



termination) the termination date sought by the PBGC;

(4) If the Schedule B described in paragraph (c)(1) of this section is for a plan year beginning before 1989, then—

(i) the reference to "column (2)" in § 2610.23(c)(3) shall be ignored;

(ii) Section 2610.23(c)(4) shall not be applied; and

(iii) Section 2610.23(c)(5) shall be applied by using, instead of the amount required to be entered in column (2) on line 6d(iii) of Schedule B, the amount required to be entered on line 6d(ii) of Schedule B, and instead of the amount required to be entered on line 6e of Schedule B, an amount equal to the product of—

(A) Seven percent of the amount required to be entered on line 6d(ii) of Schedule B, multiplied by

(B) The number of years (rounded to the nearest hundredth of a year) between the date of the Schedule B data and (in the case of a distress termination) the proposed termination date or (in the case of an involuntary termination) the termination date sought by the PBGC;

(5) Section 2610.23(c)(6) shall not be applied, and the adjusted value of plan assets shall be the value of such assets required to be entered on line 8b of Schedule B (if the amount on line 8b was determined as of the first day of the plan year preceding the premium payment year) or on line 8c of Schedule B (if the amount on line 8b was determined as of a date other than the first day of the plan year preceding the premium payment year), adjusted in accordance with § 2610.23(b)(2); except that the amount of all contributions that are included in the value of assets and that were made after the first day of the plan year preceding the premium payment year shall be discounted to such first day at the interest rate prescribed in § 2610.23(b)(1) for the premium payment year, compounded annually except that simple interest may be used for any partial years; and

(6) For purposes of applying § 2610.23(c)(7), the quantity described in § 2610.23(c)(7)(ii) shall be modified by raising it to a power, the exponent being the number of years (rounded to the nearest hundredth of a year) between the date of the Schedule B data and the last day of the plan year preceding the premium payment year.

11. In § 2610.25, paragraphs (b), (c), and (d) are removed; paragraphs (e) and (f) are redesignated as paragraphs (c) and (d); paragraph (a) is amended by revising the last sentence; redesignated paragraph (c) is amended by revising the

last sentence; and new paragraphs (b) and (e) are added, to read as follows:

#### § 2610.25 Filing requirement.

(a) *General rule.* \* \* \* The premium forms and payments shall be filed no later than the applicable due dates specified in paragraph (b) of this section (for premium payment years beginning after 1992) or paragraph (e) of this section (for premium payment years beginning after 1987 and before 1993).

(b) *Due dates for premium payment years beginning after 1992.* For premium payment years beginning after 1992, the due date generally applicable to small plans is prescribed in paragraph (b)(1) of this section and the due dates generally applicable to large plans are prescribed in paragraph (b)(2) of this section; paragraphs (b)(3) and (b)(4) of this section prescribe special rules for new and newly covered plans and for plans that change plan years; and paragraph (b)(5) of this section defines the terms "large plan" and "small plan" for purposes of this paragraph (b).

(1) *Small plans; in general.* The due date for a small plan (except as provided in paragraphs (b)(3) and (b)(4) of this section) is the last day of the ninth full calendar month following the end of the plan year preceding the premium payment year.

(2) *Large plans; in general.* For a large plan (except as provided in paragraphs (b)(3) and (b)(4) of this section)—

(i) The fifteenth day of the first full calendar month following the end of the plan year preceding the premium payment year is the due date for so much of the premium as does not exceed the amount of the premium required to be paid for the plan year preceding the premium payment year (determined without regard to any refund or credit for a short premium payment year under § 2610.22(d) or (e)); and

(ii) the due date for any portion of the premium that exceeds the amount described in paragraph (b)(2)(i) of this section is the last day of the ninth full calendar month following the end of the plan year preceding the premium payment year.

(3) *New and newly covered plans.* The due date for the first premium payment year of coverage of any new plan or newly covered plan (as defined in § 2610.2) is the latest of—

(i) The last day of the ninth full calendar month that begins on or after the later of—

(A) The first day of the premium payment year, or

(B) The day on which the plan becomes effective for benefit accruals for future service;

(ii) 90 days after the date of the plan's adoption; or

(iii) 90 days after the date on which the plan becomes covered by title IV of the Act pursuant to section 4021 of the Act.

(4) *Plans that change plan years.* For a plan that changes its plan year, each due date for the short plan year shall be the applicable due date specified in paragraph (b)(1), (b)(2), or (b)(3) of this section, and each due date for the plan year that follows the short plan year shall be the later of—

(i) The applicable due date specified in paragraph (b)(1) or (b)(2) of this section; or

(ii) 90 days after the date on which the amendment changing the plan year was adopted.

(5) *Definition of "large plan" and "small plan."* For purposes of this paragraph (b), a "large plan" is a plan that was required to pay premiums for 5,000 or more participants for the plan year preceding the premium payment year, and a "small plan" is a plan that was required to pay premiums for fewer than 5,000 participants for the plan year preceding the premium payment year.

(c) *Continuing obligation to file.* \* \* \* The entire premium computed under this subpart must be paid for that plan year, whether or not the plan is entitled to a refund for a short plan year pursuant to § 2610.22(d)(3) or (4).

(e) *Due dates for premium payment years beginning after 1987 and before 1993.* For premium payment years beginning after 1987 and before 1993, the due date generally applicable to small plans is prescribed in paragraph (e)(1) of this section and the due dates generally applicable to large plans are prescribed in paragraph (e)(2) of this section; paragraphs (e)(3) and (e)(4) of this section prescribe special rules for new and newly covered plans and for plans that change plan years; and paragraph (e)(5) of this section defines the terms "large plan" and "small plan" for purposes of this paragraph (e).

(1) *Small plans; in general.* The due date for a small plan (except as provided in paragraphs (e)(3) and (e)(4) of this section) is the fifteenth day of the eighth full calendar month following the month in which the premium payment year begins.

(2) *Large plans; in general.* For a large plan (except as provided in paragraphs (e)(3) and (e)(4) of this section)—

(i) The due date for the multiemployer premium required by § 2610.22(b) and for the flat rate portion of the single-employer premium required by § 2610.22(a)(1) is the last day of the



second full calendar month following the close of the plan year preceding the premium payment year; and

(ii) The due date for the variable rate portion of the single-employer premium required by § 2610.22(a)(2) is the fifteenth day of the eighth full calendar month following the month in which the premium payment year begins.

(iii) If the number of plan participants on the last day of the plan year preceding the premium payment year is not known by the date specified in paragraph (e)(2)(i) of this section, a reconciliation filing (on the form prescribed by this part) and any required premium payment or request for refund shall be made by the date specified in paragraph (e)(2)(ii) of this section.

(3) *New and newly covered plans.* The due date for the first premium payment year of coverage of any new plan or newly covered plan (as defined in § 2610.2) is the latest of—

(i) The fifteenth day of the eighth full calendar month following the month in which the plan year begins or, if later, in which the plan becomes effective for benefit accruals for future service;

(ii) 90 days after the date of the plan's adoption; or

(iii) 90 days after the date on which the plan becomes covered by Title IV of the Act pursuant to section 4021 of the Act.

(4) *Plans that change plan years.* For a plan that changes its plan year, each due date for the short plan year shall be the applicable due date specified in paragraph (e)(1), (e)(2), or (e)(3) of this section, and each due date for the plan year that follows the short plan year shall be the later of—

(i) The applicable due date specified in paragraph (e)(1) or (e)(2) of this section; or

(ii) 30 days after the date on which the amendment changing the plan year was adopted.

(5) *Definition of "large plan" and "small plan."* For purposes of this

paragraph (e), a "large plan" is a plan that was required to pay premiums for 500 or more participants for the plan year preceding the premium payment year, and a "small plan" is a plan that was required to pay premiums for fewer than 500 participants for the plan year preceding the premium payment year.

12. Section 2610.31 is revised to read as follows:

**§ 2610.31 Purpose and scope.**

This subpart provides rules for calculating and procedures for paying premiums for plan years beginning before 1988.

13. In § 2610.33, paragraph (d) is removed; paragraph (a)(1) is amended by revising the table; and paragraph (b) is revised, to read as follows:

**§ 2610.33 Multiemployer premium rates.**

(a) \* \* \*

(1) \* \* \*

For premium payment years	Rate
After Sept. 26, 1980, and before Sept. 27, 1984.....	\$1.40
After Sept. 26, 1984, and before Sept. 27, 1986.....	1.80
After Sept. 26, 1986, and before 1988.....	2.20

(b) *New and newly covered plans.* For any new plan or newly covered plan (as defined in § 2610.2), the plan administrator shall pay the applicable premium under paragraph (a) of this section for each individual who is a participant in the plan on the date the plan becomes covered by section 4021(a) of the Act.

14. In § 2610.34, paragraphs (a)(7), (a)(8)(ii), (a)(9)(iv), and (b)(6) are removed; paragraph (a)(8)(i) is amended by removing the introductory text and by redesignating paragraphs (a)(8)(i)(A)-(D) as paragraphs (a)(8)(i)-(iv) respectively; paragraphs (a)(8), (a)(9),

and (a)(10) are redesignated respectively as paragraphs (a)(7), (a)(8), and (a)(9); paragraphs (a) introductory text, (a)(5)(i), (a)(5)(ii), (a)(6)(i), and (a)(6)(ii), and redesignated paragraphs (a)(7), (a)(8) introductory text, (a)(8)(ii)(A), (a)(8)(ii)(B), (a)(8)(iii)(A), and (a)(8)(iii)(B) are amended by revising the references "(a)(7)", "(a)(7)(ii)", "(a)(8)", "(a)(9)", and "(a)(10)" (wherever they appear) to read "(a)(6)", "(a)(6)", "(a)(7)", "(a)(8)", and "(a)(9)" respectively; redesignated paragraph (a)(9) is amended by revising the introductory text; and paragraph (c) is amended by revising the last sentence, to read as follows:

**§ 2610.34 Filing requirement.**

(a) \* \* \*

(9) For purposes of paragraphs (a)(5), (a)(6), (a)(8), (b)(4), and (b)(5) of this section, the number of participants in a plan year is determined as of the following dates:

(c) *Continuing obligation to file.* \* \* \* The entire premium computed under this subpart must be paid for that plan year.

15. Appendix B to part 2610 is amended by revising the introductory text preceding the table to read as follows:

**Appendix B—Interest Rates for Valuing Vested Benefits**

The following table lists the required interest rates to be used in valuing a plan's vested benefits under § 2610.23(b) and in calculating a plan's adjusted vested benefits under § 2610.23(c)(2) and (e)(1):

Issued in Washington, DC, this 6th day of April, 1992.

James B. Lockhart III,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 92-8242 Filed 4-9-92; 8:45 am]

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# Federal Register

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April 10, 1992

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## Part VI

### Department of Housing and Urban Development

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#### Office of the Secretary

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24 CFR Parts 812, 882, 887 and 912  
Occupancy by Single Persons, Single  
Pregnant Women, and Individuals in the  
Process of Obtaining Custody; Proposed  
Rule



# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## Office of the Secretary

24 CFR Parts 812, 882, 887 and 912

[Docket No. R-92-1596; FR-3029-P-01]

RIN No. 2577-AA95

## Occupancy By Single Persons, Single Pregnant Women, and Individuals in the Process of Obtaining Custody

**AGENCY:** Office of the Secretary.

**ACTION:** Proposed rule.

**SUMMARY:** This rule eliminates the restrictions on the admission to public and assisted housing of any single person who is not 62 years old or older, disabled, handicapped, displaced, or the remaining member of a tenant family, and prohibits the provision of a housing unit of two bedrooms or more to a single person. It also clarifies the public or assisted housing eligibility of any single individual who is pregnant or who is in the process of securing legal custody of an individual under the age of 18 years.

**DATES:** Comment Due Date: June 9, 1992.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of General Counsel, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Issues related to part 812 and programs administered by the Assistant Secretary for Housing—Federal Housing Commissioner: James J. Tahash, Director, Planning and Procedures Division, Office of Multifamily Housing Management, room 6182, 451 Seventh Street, SW., Washington, DC 20410, Telephone (202) 708-3944. A telecommunications device for deaf persons (TDD) is available at (202) 708-4594. (These are not toll-free telephone numbers.)

Issues related to part 812 (as it relates to section 8 certificates, vouchers, and Mod Rehab), parts 882 and 887, part 912 and programs administered by the Assistant Secretary for Public and Indian Housing: Casimir Bonkowski, Director, Office of Management and Policy, Office of Public and Indian Housing, room 4224, 451 Seventh Street, SW., Washington, DC 20410, Telephone (202) 708-0444. A telecommunications

device for deaf persons (TDD) is available at (202) 708-0850. (These are not toll-free telephone numbers.)

**SUPPLEMENTARY INFORMATION:** This rule amends 24 CFR parts 812, 882, 887, and 912. With the exception of the Section 8 Moderate Rehabilitation Program for Single Room Occupancy Dwellings for Homeless Individuals set forth at 24 CFR part 882, subpart H, part 812 is applicable to all housing assisted under section 8 of the United States Housing Act of 1937 (the Act), including section 8-assisted housing for which loans are made under section 202 of the Housing Act of 1959. Part 882 is applicable to the making of Housing Assistance Payments on Behalf of Eligible Families Leasing Existing Housing in accordance with provisions of section 8 of the Act. Part 887 applies to the Housing Voucher Program authorized by section 8(o) of the Act. Part 912 is applicable to public housing, including rental housing, the Turnkey III Homeownership Opportunity Program and other public housing homeownership programs, and leased housing assisted under sections 10(c) or 23 of the Act as in effect before amendment by the Housing and Community Development Act of 1974.

Parts 812 and 912 establish the definition of the term "family" and other related terms for their applicable programs. Each of these parts also contains the Department's rules for permitting occupancy by single persons in accordance with section 3(b)(3) of the Act, which is now amended by section 573(a) of the National Affordable Housing Act (NAHA) (approved November 28, 1990, Pub. L. 101-625).

No corresponding change is being made to 24 CFR part 905, which regulates Indian housing (including the Mutual Help Homeownership Opportunity Program). This is because the legislative change being proposed for regulatory implementation here was not made expressly applicable to Indian Housing Authorities (IHAs), as would be required under section 201(b)(2) of the Act for it to be applied to IHAs.

Section 573(a) of NAHA amends clause (D) of section 3(b)(3) of the Act to include in the definition of "families" any "other single person" who is not 62 years old or older, disabled, handicapped, displaced, or the remaining member of a tenant family. To identify and distinguish an individual under clause (D) from other individuals cited in this rulemaking (such as a single, pregnant woman, or a handicapped person), an individual under clause D is referred to as a single person in this preamble and proposed rule. The Department believes the

present definition of "single person" in parts 812 and 912 is still appropriate and that definition is not affected by this rulemaking.

Before the NAHA amendment, the number of single persons eligible for housing assisted under the Act who were not 62 years old or older, disabled, handicapped, displaced, or the remaining member of a tenant family was limited to a certain percentage of the units in the private owner's or public housing agency's jurisdiction. This limitation has been eliminated by the NAHA amendment, which means that HUD approval is no longer necessary to house single persons.

However, the NAHA amendment adds a new restriction on the admission of any single person to housing units assisted under the Act. "In no event", reads section 573(a)(1), in part, "may any single person under clause (D) be provided a housing unit assisted under this Act of 2 bedrooms or more." This provision does not permit any individual who is a single person to be housed in a unit of two or more bedrooms—even when no other applicants are available for such a unit. This restriction only applies to a single person under NAHA section 573(a) (an individual under section 3(b)(3)(D) of the Act). The restriction does not apply to other individuals, for example, to handicapped, elderly, or disabled persons, or single, pregnant women with no other children.

With respect to this limitation, HUD has determined that this amendment does not require any single person currently occupying a unit of two or more bedrooms to vacate the unit immediately. This is because the dislocation that could result under such an interpretation of the NAHA amendment would be completely contrary to the intent of the Act. Any single person occupying a unit of two or more bedrooms before the effective date of this regulation shall not be required to vacate the unit until two conditions are satisfied: a transfer to a unit of less than two bedrooms in the same project becomes available; and the vacated unit can immediately be leased to eligible occupants or there is some other need for the unit.

HUD is implementing the NAHA section 573(a) changes by amending 24 CFR parts 812, 882, 887, and 912. Parts 812 and 912 are nearly identical in form and content, since each imposes the same requirements on the programs subject to its coverage. The parallel structure of the two parts will be maintained in this rulemaking to ensure that section 3 of the Act continues to be



applied in a consistent manner across different programs, and also to permit ease of cross-referencing.

The Department is proposing to amend 24 CFR 812.1 and 912.1 to remove the repealed statutory 15 percent occupancy limitation on single persons. The definition of "family" in §§ 812.2 and 912.2 would be amended to include any other single person within its scope. Sections 812.3 and 912.3, both currently entitled, "Authorization to admit single persons.", will be retitled, "Priorities and unit size restrictions.", and revised to eliminate the procedures for admitting a single person that have been superseded by the NAHA amendment. Both §§ 812.3 and 912.3 would continue to assert the current priority for those individuals who are elderly, handicapped, disabled, or displaced over a single person. The new prohibition on providing any single person a unit with two or more bedrooms would be added, along with the qualification that any single person occupying a unit with two or more bedrooms on the effective date of this rule shall not be required to vacate the unit until two conditions are satisfied: a transfer to a unit of less than two bedrooms in the same project becomes available; and the vacated unit can immediately be leased to eligible occupants or there is some other need for the unit. Individuals in the category of "remaining member of a tenant family" are not subject either to the priority given elderly, handicapped, disabled, and displaced persons, or to the restriction imposed on any single person not to occupy a unit of two bedrooms or more. Sections 812.4 and 912.4 would not be affected by these amendments.

Parts 882 and 887 would be amended to impose the restriction on a single person occupying a unit of two or more bedrooms on the holders of section 8 certificates and vouchers, respectively. Presently, these rules impose no unit sized restrictions on any single person, but allow the use of vouchers and certificates for any larger size units to the extent permitted by the value of the certificate or voucher towards the rental cost of the unit. The Department has concluded that the unequivocal language of NAHA section 573(a) no longer permits this procedure, but requires the unit size limitation to be imposed on any single person receiving assistance under parts 882 or 887. The same qualification applicable in §§ 812.3 and 912.3 to single persons currently occupying units of two or more bedrooms would also apply to parts 882 and 887.

The Department, in this rulemaking, is also implementing the Fair Housing Amendments Act of 1988 (FHAA) requirement that, "the protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has attained the age of 18 years." The implementation of this provision is consistent with PIH 90-33, a Notice jointly issued on July 5, 1990 by the Assistant Secretaries for (1) Fair Housing and Equal Opportunity, (2) Housing, and (3) Public and Indian Housing.

The Department has determined that for purposes of determining the unit size assigned, single individuals, with no other children, who are pregnant or who are in the process of securing legal custody of any individual under the age of 18 years, must be considered as if they were a family consisting of two persons under section 3(a) of the Act and, if otherwise eligible and determined suitable for tenancy, must be admitted in accordance with a PHA's or private owner's policies and procedures. These individuals are not subject to the limitation on units with two or more bedrooms, as a single person would be. The provisions to implement these changes would be located in §§ 812.5 and 912.5 for single, pregnant individuals, and in §§ 812.6 and 912.6 for single individuals in the process of securing legal custody of any individual under the age of 18 years.

The rule would require that in determining the unit size with the appropriate number of bedrooms for which a single, pregnant woman is eligible, a housing provider must consider the size of the woman's household with the unborn child included. In addition, for purposes of determining basic eligibility and the income limit that should apply, a single pregnant woman would be considered as if she were a two person household. However, a single, pregnant woman would not be entitled to the benefit of the dependent allowance under §§ 813.102 or 913.102 until after the live birth of her child. If, before the initial effective date of the lease, the pregnancy ends without the live birth of a child, the single woman with no other children would be in the same status as any other single person. If the pregnancy fails to result in the live birth of a child after the initial effective date of the lease, the single woman with no other children constitutes the remaining member of a tenant family and could continue under the existing lease.

An individual in the process of adopting an individual under 18 would be eligible in the same way as a single, pregnant woman. An individual in the process of securing legal custody short of adoption, however, must provide evidence of a reasonable likelihood of successfully gaining custody to be accepted for occupancy before obtaining custody. This determination of "reasonable likelihood of success" should be made at the time an offer of a unit is made to an individual. If it is determined that there is not a reasonable likelihood of success that the applicant will obtain custody, the applicant would, nonetheless, be allowed to retain his or her place on the waiting list, with any preference for which he or she remains eligible, and with his or her original date and time of application, until reasonable likelihood of success can be demonstrated or custody is secured. The applicant would then be offered an appropriate unit in accordance with his or her position on the waiting list.

The Department has also determined that it is appropriate in this rulemaking to remove the exceptions, at §§ 812.3(e) and 912.3(e), to the preference provisions that give housing priority to elderly families (including disabled persons and handicapped persons) and displaced persons over single persons. The exceptions in these provisions permit the Field Office Director to exempt housing units from the preference upon a determination that the project or portion of the project at issue is not suitable for occupancy by the elderly, disabled, or handicapped. The exceptions are proposed to be removed from the rule because of the uncertainty inherent in determining the suitability of a particular project for an entire class of people.

## Other Matters

### A. Economic Impact

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 on Federal Regulation issued by the President on February 17, 1981. Analysis of the rule indicates that it does not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign-



based enterprises in domestic or export markets.

#### B. Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

#### C. Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule do not have federalism implications and, thus, are not subject to review under the Order. This rule merely makes certain statutorily required changes in definitions that will not have substantial, direct effects on States, on their political subdivisions, or on their relationships with the Federal government, or on the distribution of power and responsibilities between them and other levels of government.

#### C. Family Impact

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule will not have a potentially significant negative impact on family formation, maintenance, and general well-being, and thus, is not subject to review under the Order. The rule serves to implement statutorily required changes by including any single person in the definition of "family" under the United States Housing Act of 1937. The rule also clarifies the public and assisted housing status of individuals who are single and pregnant or who are in the process of securing custody of a child. Although it is anticipated that single persons will benefit from this change to the extent that it results in an alleviation of homelessness among these individuals, family housing will, in general, not be affected because the change does not permit any single person to be provided with larger, family-sized units of two or more bedrooms. There could be a slight negative impact on families consisting of two individuals who would be in competition for one-bedroom units with an increased number of newly eligible single persons. However, this potential impact will be offset by the anticipated beneficial impact on homelessness, and a family consisting of two individuals might still qualify for a two-bedroom

unit for which any single person would not be eligible.

#### E. Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule is only an implementation of statutory requirements that adjust the way the term "family" is defined.

This proposed rule was listed as Item No. 1495 in the Department's Semiannual Agenda of Regulations published on October 21, 1991 (56 FR 53380, 53426) under Executive Order 12291 and the Regulatory Flexibility Act.

#### List of Subjects

##### 24 CFR Part 812

Low and moderate income housing. Reporting and recordkeeping requirements.

##### 24 CFR Part 882

Grant programs—housing and community development, Lead poisoning, Manufactured homes, Homeless, Rent subsidies, Reporting and recordkeeping requirements.

##### 24 CFR Part 887

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

##### 24 CFR Part 912

Public housing, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, parts 812, 882, 887, and 912 of title 24 of the Code of Federal Regulations are proposed to be amended as set forth below:

#### PART 812—DEFINITION OF FAMILY AND OTHER RELATED TERMS; OCCUPANCY BY ANY SINGLE PERSON

1. The authority citation for part 812 would be revised to read as follows:

Authority: Sec. 3, United States Housing Act of 1937 (42 U.S.C. 1437a); Fair Housing Act (42 U.S.C. 3601-3619); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

2. Section 812.1(a)(2) would be revised to read as follows:

##### § 812.1 Purpose and applicability.

(a) \* \* \*

(2) Prescribes criteria and procedures for occupancy by single, pregnant women; individuals in the process of

securing legal custody of an individual; and any Single Person not otherwise eligible by reason of qualification as an Elderly Family or as a Displaced Person or as the remaining member of a tenant family.

3. The definition of *Family* in § 812.2 would be revised to read as follows:

##### § 812.2 Definitions.

*Family.* Family includes but is not limited to,

- (a) An Elderly Family,
- (b) The remaining member of a tenant family,
- (c) A Displaced Person, and
- (d) Any other Single Person.

4. Section 812.3 would be revised to read as follows:

##### § 812.3 Priorities and unit size restrictions.

(a) *Priority to elderly and displaced persons.* A PHA or private owner shall extend a preference for housing units to Elderly Families (including Disabled persons and Handicapped Persons) and Displaced Persons over Single Persons.

(b) *Unit size limitation for any Single Person.* (1) Any Single Person may not be provided a unit with two or more bedrooms.

(2) Any Single Person occupying a unit with two or more bedrooms before the effective date of this rule shall not be required to vacate the unit until:

(i) A transfer to a unit of less than two bedrooms in the same project becomes available; and,

(ii) The vacated unit can immediately be leased to eligible occupants, or there is another need for the unit.

(c) This section shall not apply to the Section 8 Moderate Rehabilitation Program for Single Room Occupancy Dwellings for Homeless Individuals set forth at 24 CFR part 882, subpart H.

5. A new § 812.5 would be added to read as follows:

##### § 812.5 Single pregnant women.

(a) For purposes of determining the basic eligibility, applicable income limits, and the number of bedrooms to which she is entitled, a single, pregnant woman, with no other children, must be considered as if she were a family consisting of two persons and, if otherwise eligible and determined suitable for tenancy, shall be admitted in accordance with a PHA's or private owner's policies and procedures.

(b) A single, pregnant woman shall not be entitled to the benefit of the dependent allowance in accordance



with § 813.102 of this chapter until after the live birth of the child.

(c) If the pregnancy ends without a live birth before the initial effective date of the lease, a single woman without any other children shall be considered the same as any other Single Person.

(d) If the pregnancy ends without a live birth after the initial effective date of the lease, a single woman without any other children constitutes the remaining member of a tenant family and may continue as a tenant under the existing lease or otherwise continue to be eligible for assistance.

6. A new § 812.6 would be added to read as follows:

**§ 812.6 Individuals in the process of securing legal custody.**

(a) For purposes of determining the basic eligibility, applicable income limits, and the number of bedrooms to which he or she is entitled, a single individual with no other children, who is in the process of securing legal custody of an individual under the age of 18 years, must be considered as if he or she were a family consisting of two persons and, if otherwise eligible and determined suitable for tenancy, shall be admitted in accordance with a PHA's or private owner's policies and procedures.

(b) An individual under this section shall not be entitled to the benefit of the dependent allowance in accordance with § 813.102 of this chapter until after legal custody is secured.

(c) An individual under this section in the process of obtaining legal custody through means other than adoption shall provide the PHA or private owner with evidence of a reasonable likelihood of successfully obtaining custody in order to be admitted to occupancy before obtaining custody. The PHA or private owner shall make a determination as to reasonable likelihood of success, based upon the evidence provided, at the time an offer of a unit is to be made to an individual under this section. If at that time it is determined that there is not a reasonable likelihood of success, then that individual shall, nonetheless, be allowed to retain his or her place on the waiting list, with any preference for which he or she remains eligible, and with his or her original date and time of application, until reasonable likelihood of success can be demonstrated or custody is secured. At that time, the individual would be offered an appropriate unit in accordance with his or her position on the waiting list.

**PART 882—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—EXISTING HOUSING**

7. The authority citation for part 882 would continue to read as follows:

**Authority:** Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subpart H is also issued under secs. 401 and 441, Stewart B. McKinney Homeless Assistance Act, Pub. L. 100-77, approved July 22, 1987; secs. 481 and 485, Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. 100-628, approved November 7, 1988.

8. Section 882.209(i)(1) would be revised to read as follows:

**§ 882.209 Selection and participation.**

\* \* \* \* \*

(i) \* \* \*

(1) Regardless of the number of bedrooms stated on the Certificate, no otherwise acceptable unit shall be disapproved on the ground that it is too large for the Family, if the rent to Owner plus any Utility Allowance applicable to the actual larger size unit does not exceed the Fair Market Rent, or such higher rent as may previously have been approved by HUD under § 882.106(a)(3) or (4), for a unit with the number of bedrooms stated on the Certificate. However, a Single Person may not be provided a unit of two or more bedrooms.

\* \* \* \* \*

**PART 887—HOUSING VOUCHERS**

9. The authority citation for part 887 would continue to read as follows:

**Authority:** Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

10. Section 887.253(c) would be revised to read as follows:

**§ 887.253 Occupancy standards.**

\* \* \* \* \*

(c) *Renting unit with more bedrooms than stated on housing voucher.* Regardless of the number of bedrooms stated on the housing voucher, the PHA may not prohibit a family from renting an otherwise acceptable unit on the ground that it is too large for the family. However, a Single Person may not be provided a unit of two or more bedrooms.

\* \* \* \* \*

**PART 912—DEFINITION OF FAMILY AND OTHER RELATED TERMS; OCCUPANCY BY ANY SINGLE PERSON**

11. The authority citation for part 912 would continue to read as follows:

**Authority:** Sec. 3, United States Housing Act of 1937 (42 U.S.C. 1437a); Fair Housing Act (42 U.S.C. 3601-3619); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

12. Section 912.1(a)(2) would be revised to read as follows:

**§ 912.1 Purpose and applicability.**

(a) \* \* \*

(2) Prescribes criteria and procedures for occupancy by single, pregnant women; individuals in the process of securing legal custody of an individual; and any Single Person not otherwise eligible by reason of qualification as an Elderly Family or as a Displaced Person or as the remaining member of a tenant family.

\* \* \* \* \*

13. The definition of *Family* in § 912.2 would be revised to read as follows:

**§ 912.2 Definitions.**

\* \* \* \* \*

*Family.* Family includes but is not limited to,

- (a) An Elderly Family,
- (b) The remaining member of a tenant family,
- (c) A Displaced Person, and
- (d) Any other Single Person.

\* \* \* \* \*

14. Section 912.3 would be revised to read as follows:

**§ 912.3 Priorities and unit size restrictions.**

(a) *Priority to elderly and displaced persons.* A PHA or private owner shall extend a preference for housing units to Elderly Families (including Disabled Persons and Handicapped Persons) and Displaced Persons over Single Persons.

(b) *Unit size limitation for any Single Person.* (1) Any Single Person may not be provided a unit with two or more bedrooms.

(2) Any Single Person occupying a unit with two or more bedrooms before the effective date of this rule shall not be required to vacate the unit until:

(i) A transfer to a unit of less than two bedrooms in the same project becomes available; and,

(ii) The vacated unit can immediately be leased to eligible occupants, or there is another need for the unit.

15. A new § 912.5 would be added to read as follows:



**§ 912.5 Single pregnant women.**

(a) For purposes of determining the basic eligibility, applicable income limits, and the number of bedrooms to which she is entitled, a single, pregnant woman, with no other children, must be considered as if she were a family consisting of two persons and, if otherwise eligible and determined suitable for tenancy, shall be admitted in accordance with a PHA's or private owner's policies and procedures.

(b) A single, pregnant woman shall not be entitled to the benefit of the dependent allowance in accordance with § 913.102 of this chapter until after the live birth of the child.

(c) If the pregnancy ends without a live birth before the initial effective date of the lease, the single woman without any other children shall be considered the same as any other Single Person.

(d) If the pregnancy ends without a live birth after the initial effective date of the lease, a single woman without any other children constitutes the remaining member of a tenant family and may continue as a tenant under the

existing lease or otherwise continue to be eligible for assistance.

16. A new § 912.6 would be added to read as follows:

**§ 912.6 Individuals in the process of securing legal custody.**

(a) For purposes of determining the basic eligibility, applicable income limits, and the number of bedrooms to which he or she is entitled, a single individual with no other children, who is in the process of securing legal custody of an individual under the age of 18 years, must be considered as if he or she were a family consisting of two persons and, if otherwise eligible and determined suitable for tenancy, shall be admitted in accordance with a PHA's or private owner's policies and procedures.

(b) An individual under this section shall not be entitled to the benefit of the dependent allowance in accordance with § 913.102 of this chapter until after legal custody is secured.

(c) An individual under this section in the process of obtaining legal custody through means other than adoption shall

provide the PHA or private owner with evidence of a reasonable likelihood of successfully obtaining custody in order to be admitted to occupancy before obtaining custody. The PHA or private owner shall make a determination as to reasonable likelihood of success, based upon the evidence provided, at the time an offer of a unit is to be made to an individual under this section. If at that time it is determined that there is not a reasonable likelihood of success, then that individual shall, nonetheless, be allowed to retain his or her place on the waiting list, with any preference for which he or she remains eligible, and with his or her original date and time of application, until reasonable likelihood of success can be demonstrated or custody is secured. At that time, the individual would be offered an appropriate unit in accordance with his or her position on the waiting list.

Dated: February 24, 1992.

Jack Kemp,

Secretary.

[FR Doc. 92-8319 Filed 4-9-92; 8:45 am]

BILLING CODE 4210-32-M



# Executive Order

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Friday  
April 10, 1992

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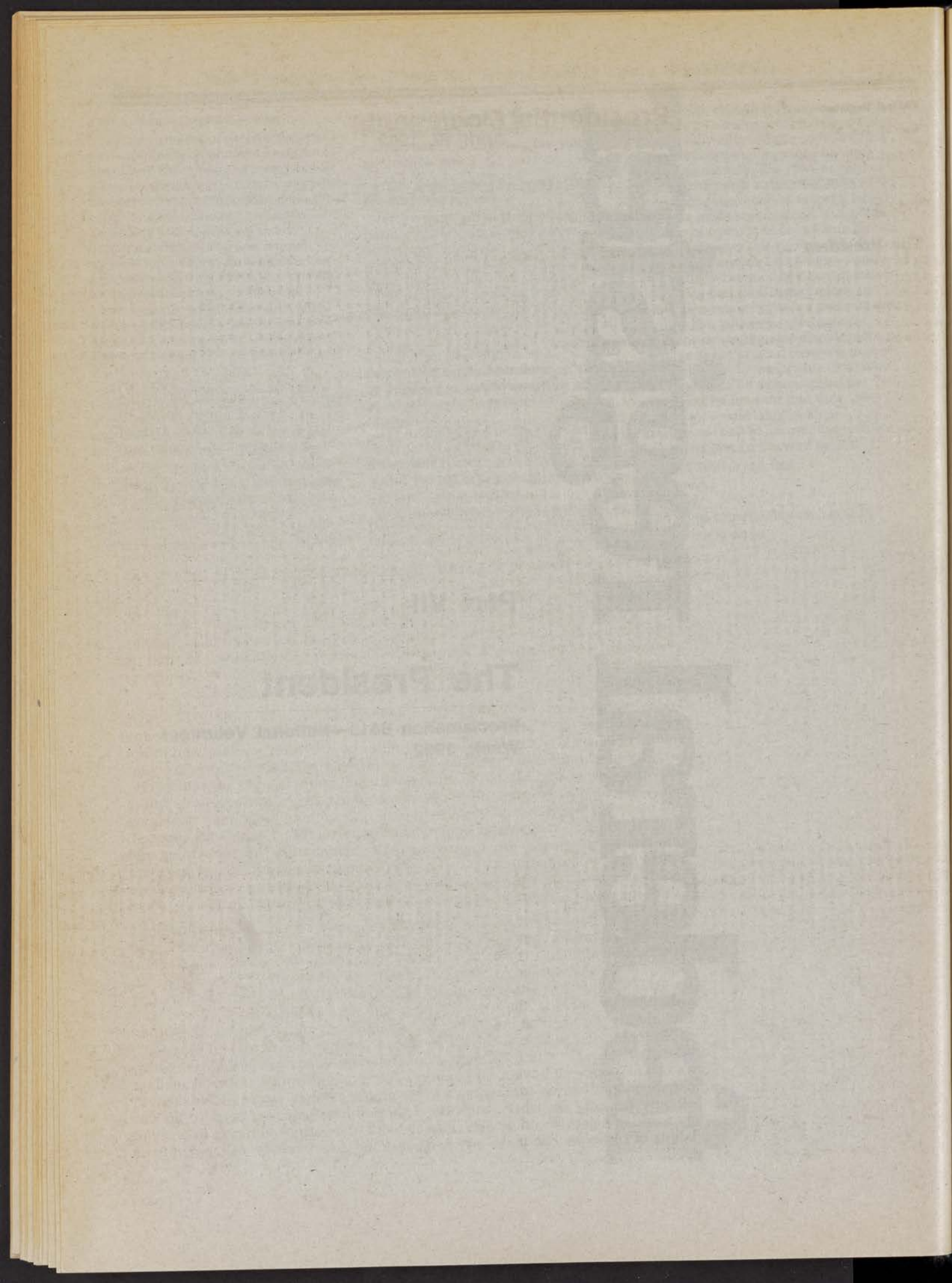
## Part VII

### The President

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Proclamation 6418—National Volunteer  
Week, 1992







## Presidential Documents

Title 3—

Proclamation 6418 of April 8, 1992

The President

National Volunteer Week, 1992

By the President of the United States of America

### A Proclamation

Experiencing the profound sense of satisfaction and even joy that comes from helping others, millions of Americans are transforming communities across the country through voluntary service. We owe a great deal to these Points of Light, and during National Volunteer Week we offer a special salute to each of them. Their work has brightened the lives of countless individuals and demonstrated the heights that we can achieve as a Nation.

By taking direct and consequential action to help solve serious social problems and by working to enhance the existing good in their communities, volunteers are helping to build the kind of America we all seek. These Points of Light are helping to build what I call Communities of Light—places that demonstrate a strong commitment to children and to the values that foster stable, loving families; that contain excellent schools and a culture that encourages lifelong learning; and that offer every citizen meaningful employment opportunities and the hope of economic advancement. A Community of Light would also offer its members decent housing in a safe, drug-free, and clean environment, as well as access to quality health care. While effective government leadership and sustainable economic growth are essential to promoting these conditions in any community, we know that real progress also requires voluntary action and leadership at the grass-roots level.

Today volunteers are helping to achieve progress in a variety of ways, working either on their own or in association with others. For example, many volunteers are assisting children and families by providing prenatal and infant care, by teaching parenting skills, and by offering wholesome extracurricular activities for youth. Other volunteers—including thousands of senior citizens—are helping to promote excellence in our schools by serving as tutors and mentors. Volunteers who participate in job training programs are helping to open doors to meaningful employment opportunities for persons in need, and many Americans are improving their communities by renovating old homes and building affordable housing. Volunteers are also helping to expand health care options by providing transportation, home care services, and other forms of support for persons who are ill or otherwise incapacitated.

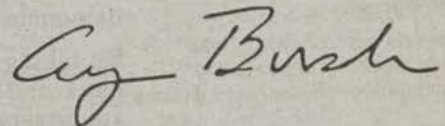
Although millions of Americans engage in voluntary service, making this time-honored tradition a leading tool in the fight against poverty, drug abuse, and other social problems requires committed leadership. Since 1971, the Federal Government has worked to mobilize Americans for volunteer service through the ACTION agency. Other examples of our Federal commitment to promoting volunteerism include the Peace Corps, the Commission on National and Community Service, the Points of Light Foundation, and, of course, the Office of National Service here at the White House. Yet businesses and labor unions, educational and health care institutions, religious congregations, social clubs, and civic groups all have a role to play. These organizations and their leaders can develop effective, innovative service programs; they can replicate what is already working elsewhere; and they can mobilize their members for action. By working together and by encouraging more and more Americans to become Points of Light, we can make any neighborhood, town, or city a Community of Light.



Because voluntary service can go such a long way toward improving our communities and solving problems wherever they exist, creating Communities of Light must become one of America's priorities for the close of this century. During this annual celebration, I call on all leaders to include voluntary service to others as part of the mission of their institutions, to recognize and support the work of volunteers, and to help transform their communities through service.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim the week beginning April 26, 1992, as National Volunteer Week. I urge all Americans to observe this week with appropriate programs, ceremonies, and activities in honor of volunteers and in recognition of their important contributions to our communities and country.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of April, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and sixteenth.



[FR Doc. 92-8533

Filed 4-9-92; 9:36 am]

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Vol. 57, No. 70

Friday, April 10, 1992

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Last List April 6, 1992



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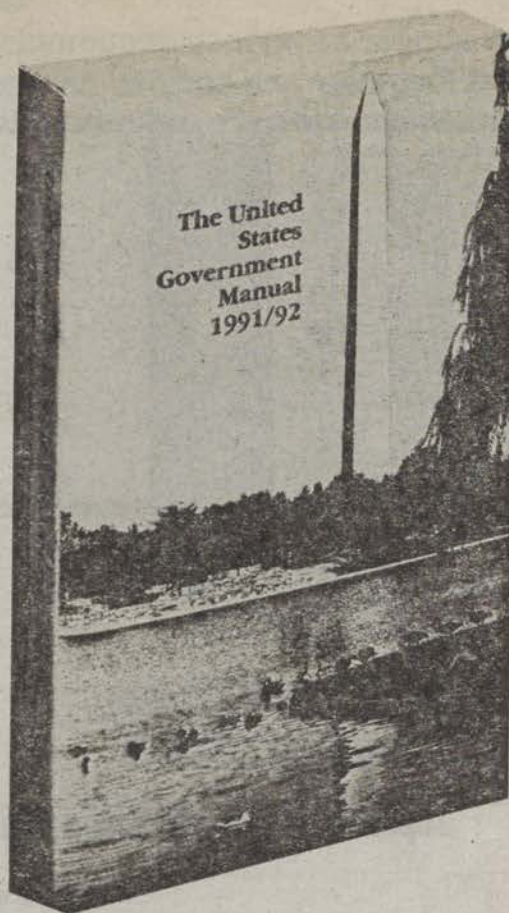
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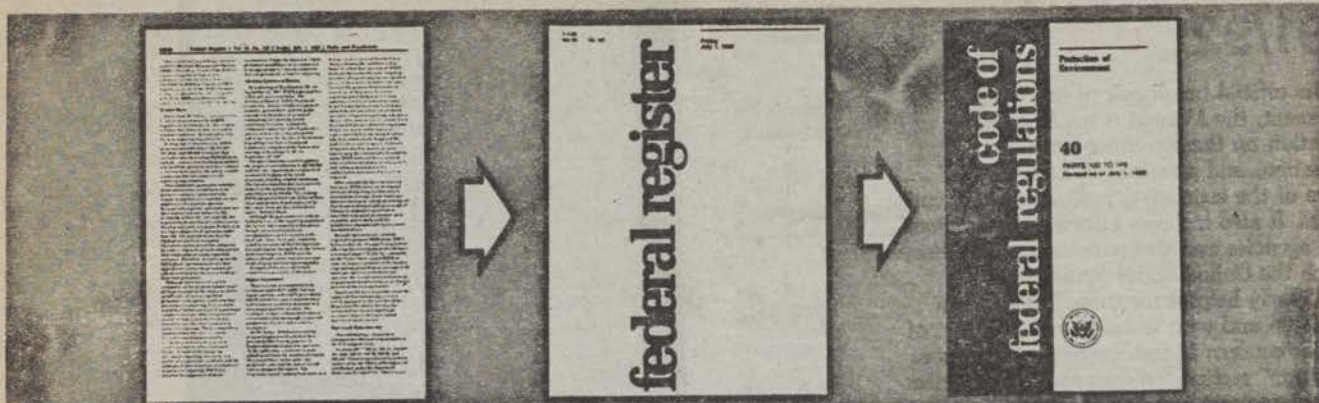
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